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No. 17746

United States
COURT OF APPEALS
for the Ninth Circuit

PHILIP WEINSTEIN, et al,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT PHILIP WEINSTEIN

Appeal from the United States District Court for the District of Oregon.

DWIGHT L. SCHWAB,
DENTON G. BURDICK, JR.,
HUTCHINSON, SCHWAB & BURDICK,
712 Executive Building, Portland, Oregon,
Attorneys for Appellant Philip Weinstein

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-64

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JURISDICTIONAL STATEMENT

An indictment was filed on January 20, 1961, in the United States District Court for the District of Oregon against Philip Weinstein (appellant in this brief), George James Barnard, also known as James Barnard, Arthur Roscoe Smith, Larry Warren Haynes, Raymond Henry Knippel, Patricia Ann DePlois, also known as Pat Bender, Donald William Johnstone, William Mack Lasiter, Darrel Wayne Saunders, David Leon Boisjolie, Leland Arthur Deegan, also known as Sonny Deegan, Geraldine Ruth Deegan, Ronald Eugene Allison, John Norris Barnard, and Charles Harry Giegerich, also known as Chuck Rich (R. 1).

The indictment contained nine counts, the first eight for mail fraud (18 USC §1341), the ninth count being for conspiracy (18 USC §371).

Weinstein was charged in Counts VI, VII, VIII and IX. Judgment of conviction was entered against him upon the verdict of the jury. He appeals from that judgment.

Jurisdiction of the court below was predicated upon 18 USC § 3231. The jurisdiction of this court is based upon 28 USC § 1291.

SUMMARY OF INDICTMENT

The indictment contains nine counts. All relate to the staging of automobile collisions for the purpose of obtaining money from insurance companies for personal injury. Weinstein was not named in the first five counts.

Count I:

Collision February 16, 1960. Defendants George James Barnard, Arthur Roscoe Smith (guilty plea), and Larry Warren Haynes (guilty plea).

Count II:

(Same as Count I, with exception of different mailing.)

Count III:

Collision September 5, 1959. Defendants George Barnard, Donald William Johnstone, Patricia Ann DePlois, Raymond Henry Knippel, and William Mack Lasiter.

Count IV:

Collision October 16, 1958. Defendants George Barnard, Darrel Wayne Saunders, and David Leon Boisjolie (guilty plea).

Count V:

(Same as Count IV with different mailing.)

Count VI:

Collision September 11, 1958. Defendants Philip Weinstein, George Barnard, Leland Arthur Deegan (guilty plea), Geraldine Ruth Deegan (guilty plea), and Darrel Wayne Saunders.

Count VII:

Collision August 18, 1958. Defendants Philip Weinstein, George Barnard, Ronald Eugene

Allison, John Norris Barnard, and Charles Harry Giegerich.

Count VIII:

(Same as Count VII, with different mailing.)

Count IX:

Conspiracy alleging four separate overt acts plus as additional overt acts all of the overt acts alleged in the first eight counts. The last overt act was dated May 11, 1960 (R. 9). Alleged conspirators are all named defendants, plus Richard L. Sanseri, Donovan S. McCoy, Ann L. Kimmel, Lewis C. Swertfeger, also known as Lewis C. Scott, Ronald A. Miller, Dennis D. Dunham, Gordon L. McCoy, Esther L. Howerton, and James W. Page (R. 7). Five additional conspirators were later named: Catherine Barnard, Alfred E. Wooldridge, Conrad L. Kerr, James F. Barnard, and Keith I. Rose (R. 58).

In connection with the conspiracy count, although not alleged in the indictment, the government introduced evidence of a sixth collision occurring January 17, 1959, involving Alfred Wooldridge, Conrad Kerr, James F. Barnard, and defendant Raymond Knippel.

All defendants were convicted on all counts as charged, excepting George James Barnard was acquitted as to Counts VII and VIII (R. 228).

STATEMENT OF THE CASE

This is the appeal of defendant Philip Weinstein. At the time of trial he was 48 years old (XXIV, 4674). Weinstein had a highly successful law practice in Portland, Oregon, commencing shortly after World War II (XXIV, 4678). Weinstein handled hundreds of personal injury and criminal cases (XVI, 3033; XXIV, 4680; Ex. 499). He had a wide acquaintance in the Portland area (XXII, 4304; XXIV, 4680).

In the eight-month period starting a month before the first collision alleged in the indictment involving Weinstein and ending a month after the last said collision (July 1958 through February 1959), Weinstein took into his office 106 new, legitimate personal injury cases. From these 106 cases he eventually made approximately $64,000 (Ex 499; XXV, 4885-4897). In addition to the 106 cases that came in during this critical eight-month period, he also had other business (XXV, 4898).

In 1958, 1959, 1960, five rear-end collisions occurred in Portland which the indictment charges were planned by various of the defendants and named conspirators. In each instance, money was paid to occupants of the struck vehicle by the insuring company of the owner of the striking vehicle. Weinstein's connection with the five collisions was as follows:

Counts I and II—None

Count III—None

Counts IV and V—He started to represent the oc-

cupants of the struck vehicle. He later turned the matter over to another attorney.

Count VI—He represented all of the occupants of the struck vehicle.

Counts VII and VIII—He represented all of the occupants of the struck vehicle.

All occupants of all the vehicles were named as defendants or conspirators in the indictment.

The only named defendants who were not physically involved as occupants in one of the above collisions were Philip Weinstein, George Barnard, William Lasiter and Raymond Knippel. George Barnard was named in each count. The government's evidence showed that George Barnard was active in lining up participants for the various collisions. Lasiter and Knippel were charged with helping to arrange the collision set forth in Count III.

All evidence against Weinstein was circumstantial. There is no direct evidence that he had any guilty knowledge. Weinstein contends there is no sufficient evidence of guilty knowledge.

The evidence against Weinstein was chiefly:

1. He represented a number of the participants (true).
2. He loaned money to a number of the participants (true). — It was the contention of the government that Weinstein was financing the staged-collision participants.

From the foregoing the government would infer guilty knowledge on the part of Weinstein.

The facts and details are carefully discussed infra under Specification of Error No. I—"The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal," and in the Appendix.

The questions involved in this appeal and the manner in which they were raised are as follows:

I—The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal.—Question raised by motion at the end of the government's case (XIX, 3682) and at the end of all the evidence (XXIX, 5677); after verdict by motion in writing (R. 101).

II—The Trial Court Erred in Denying Weinstein's Motion for Separate Trial. — Question raised on motion for separate trial (R. 14-20; R. 80; XIX, 3686; XXIX, 5680).

III—The Trial Court Erred in Curtailing the Cross-Examination of the Witnesses Leland and Geraldine Deegan in Connection with the Alleged Intimidation by Deegan of the Defendant Boisjolie, and other Circumstances Involving the Last Minute Confessions of the Deegans. — This question was raised by questions asked of the two Deegans and offers of proof (III, 487, 508, 519, 535; IV, 720-725, 738-742).

IV—The Trial Court Erred in Denying Wein-

stein's Motion for Access to Certain Documents (Jencks Act):

(a) Statement made to government agents November 1958 by Katherine Hart. — Question raised by request of counsel (XVIII, 3593); denied (XIX, 3650); marked Exhibit K (XIX, 3651).

(b) Thirty-page statement made to government agents July 1960 by Katherine Hart. — Question raised by request of counsel (XVIII, 3492); counsel given only disjointed parts of several pages (Ex. 454, XVIII, 3558-3560; XIX, 3661); remaining pages refused (Ex. I; XVIII, 3503).

(c) Confession of defendant Geraldine Deegan signed the day before commencement of trial. — Question raised by exception of counsel to deletion of a portion (portion furnished Ex. 407; IV, 686; deleted portion Ex. C; IV, 649).

V—The Evidence Showed No Single Conspiracy as Charged, But If Anything, a Group of Conspiracies. — Question raised at end of government's case by motion for judgment of acquittal (XIX, 3685), and again at the end of all of the evidence (XXIX, 5679).

VI—The Trial Court Erred in Admitting Hearsay After the Termination of the Alleged Con-

spiracy. — Question raised by objection to the testimony (VII, 1203, 1204, 1209; motion to strike, VII, 1240, 1241; motion to strike, VII; 1244, 1249; motion to strike, VII, 1252; motion to strike, VII, 1369, 1374); by motion for judgment of acquittal or in the alternative a new trial at the end of the evidence (XXIX, 5681); by exception to the instructions (XXX, 5889).

VII—The Trial Court Erred in Instructing the Jury on Proof of the Existence of a Conspiracy. — Question raised by exception to the instruction (XXX, 5891).

VIII—The Trial Court Erred in Limiting Oral Argument by Weinstein to One Hour. — Question raised by objection (XXVI, 5200; XXVII, 5393-5395; XXIX, 5725; XXX, 5891).

IX—The Matters Involved Were Primarily of Local Concern. — Question raised by motion (R. 84) and argument (I, 36, 37).

SPECIFICATIONS OF ERROR

Specification of Error No. I:

The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal.

Specification of Error No: II:

The Trial Court Erred in Denying Weinstein's Motion for Separate Trial.

Specification of Error No. III:

The Trial Court Erred in Curtailing the Cross-Examination of the Witnesses Leland and Geraldine Deegan in Connection with the Alleged Intimidation by Deegan of the Defendant Boisjolie, and Other Circumstances Involving the Last Minute Confessions of the Deegans. (Infra 93-97; 99-103 for the full substance of evidence rejected, and quotation of the grounds urged at the trial in objection to the rejection.)*

Specification of Error No. IV:

The Trial Court Erred in Denying Weinstein's Motion for Access to Certain Documents (Jencks Act).

Specification of Error No. V:

The Evidence Showed No Single Conspiracy as Charged, But if Anything, a Group of Conspiracies.

Specification of Error No. VI:

The Trial Court Erred in Admitting Hearsay After the Termination of the Alleged Conspiracy. (Infra 120-131 for the full substance of evidence admitted, and quotation of the grounds urged at the trial in objection to the admission; 136-138 for the instruction given on the ending of the conspiracy *totidem verbis,* together with the grounds of the objection urged at the trial.)*

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* This information is set forth in compliance with rule 18 2(d), but in order to conserve space is not set forth here *in haec verba,* it being set forth in the pages referred to.

Specification of Error No. VII:

The Trial Court Erred in Instructing the Jury on Proof of the Existence of a Conspiracy. (Infra 138-139 for the instruction given *totidem verbis,* together with the grounds of the objection urged at the trial.)*

Specification of Error No. VIII:

The Trial Court Erred in Limiting Oral Argument by Weinstein to One Hour.

Specification of Error No. IX:

The Matters Involved Were Primarily of Local Concern.

SUMMARY OF ARGUMENT

Specification of Error No. I:

All evidence against Weinstein was circumstantial; there was no substantial evidence of guilt; all of the evidence was as consistent with innocence as it was with guilt; Weinstein should have been granted judgment of acquittal; the matter should never have gone to the jury.

Specification of Error No. II:

1. The court abused its discretion in not allowing Weinstein's motions for a separate trial. He could not receive a fair trial when tried *en masse* with a group

*See note bottom of page 9.

of clients with bad records. He was branded guilty by reason of his professional association. To try an attorney with his clients will further the trend of discouraging attorneys from representing persons accused of crimes or persons with undesirable backgrounds or reputations.

2. It is error as a matter of law to join defendants in a single trial where some of the charges are unrelated to all of the defendants. In this case, Weinstein had no relation whatsoever to Counts I, II and III. When this was revealed, Weinstein's motion for separate trial should have been granted.

Specification of Error No. III:

Leland Deegan and Geraldine Deegan were defendants standing on a not-guilty plea until shortly before the trial in September 1961. Deegan was indicted for intimidation of the defendant Boisjolie the previous July at Deegan's place of employment. Deegan was jailed for intimidation under excessive bail. He and his wife capitulated, confessed and became the chief witnesses for the government against Weinstein. The court refused to allow Weinstein to cross-examine into the circumstances of the alleged intimidation, as well as into other matters which showed the pressure exerted on the Deegans in order to obtain their confessions. As for the alleged intimidation, had Weinstein been able to cross-examine in full, he could have shown that the Deegans, knowing that the charge was without foundation, realized that further resistance to the government was futile —that Deegan would be in jail indefinitely if he did not cooperate with the government.

Specification of Error No. IV:

Katherine Hart testified she was in Weinstein's office and observed George Barnard leave with money. Within three weeks she voluntarily went to the FBI and gave a statement. Under the Jencks Act, Weinstein should have been allowed to examine the statement. If it had no reference whatsoever to the alleged incident, that in itself, was of considerable importance.

Several years later she gave a 30-page statement to the government. Weinstein was given a couple of pages removed from the context, unintelligible in part. He should have been given the full statement.

Portions of defendant Geraldine Deegan's confession was cut out. Under the circumstances, the entire confession should have been furnished to Weinstein for cross-examination purposes.

Specification of Error No. V:

Count IX charges a single, over-all conspiracy. The evidence shows six individual conspiracies, assuming any is shown. A variance exists between the indictment and the proof.

Specification of Error No. VI:

The last overt act alleged in the indictment was dated May 11, 1960. The court allowed a number of hearsay statements, highly prejudicial to Weinstein, made subsequent to May 11, 1960. One of them was made the day after the indictment was filed with the District

Court clerk. The court erroneously allowed this hearsay against Weinstein although he was not present, apparently on the theory that the indictment charged a conspiracy to conceal the facts of the staged accidents; that, thus, the conspiracy continued uninterrupted on up to the time of the indictment. The court did not instruct the jury that concealment could not be an overt act and that the last overt act had to be no later than May 11, 1960.

Specification of Error No. VII:

Instructing, the court told the jury that proof concerning the accomplishment of the objects of a conspiracy is the most persuasive evidence of the existence of a conspiracy itself. The object of the alleged conspiracy was to obtain money from insurance companies. Money was obtained from insurance companies. Had the collisions herein been perfectly valid, under this instruction the defendants would have been guilty.

Specification of Error No. VIII:

The government called 84 witnesses. Weinstein 25, total 109. There were over 400 exhibits. The transcript of testimony exceeds 6,000 pages. The trial extended over a period of two months. The court told the jury that the case bristled with issues of veracity and that in instances too numerous to specify the testimony of witnesses called by the government is flatly contradicted by testimony of the defendants. It was possible, in one hour, only to skim lightly over the eight-week trial. By

limiting Weinstein to one hour, the court deprived him of his rights under the Sixth Amendment.

Specification of Error No. IX:

The evidence shows that the defendants who participated in the staged collisions were a local group of petty defrauders. The matter was strictly local in scope, involving the obtaining of money by false pretenses. The use of the mails was incidental and did not enter into the scheme. Federal prosecutions should not get involved in matters that are primarily of local concern.

ARGUMENT

SPECIFICATION OF ERROR NO. I

The Trial Court Erred in Denying Weinstein's Motions for Judgment of Acquittal.

Weinstein moved for a judgment of acquittal at the end of the government's case (XIX, 3682); and again at the end of all the evidence (XXIX, 5677); both were denied (XIX, 3711; XXIX, 5689). After the verdict, Weinstein filed a motion for judgment of acquittal (R. 101) and a new trial (R. 106). These motions were denied (R. 231).

There are three matters upon which the evidence cannot be doubted:

1. The mails were used (although very incidentally, and the use of the mails never entered into the contemplation of the defendants).

2. The collisions were staged. [This statement is made with a reservation as to the collision of August 16, 1958 (Counts VII and VIII). It is extremely doubtful that there was any sufficient evidence to show that this collision was not legitimate.]

3. Weinstein was acquainted with a number of the defendants and named conspirators; he represented a number of them; he paid sums of money to them by way of loans.

The issue is KNOWLEDGE. Did Weinstein KNOWINGLY participate in staged collisions—or was he, too, a victim? Was there sufficient evidence to submit to the jury on Weinstein's guilt, or should the court have granted the motion for judgment of acquittal?

There was no direct evidence of Weinstein's guilt. All evidence against Weinstein is circumstantial.

The rule for determining whether the trial court properly denied the motion for judgment of acquittal is stated as follows:

> "The test to be applied on motion for judgment of acquittal in such a case, however, is not whether in the trial court's opinion the evidence fails to exclude every hypothesis but guilt, but rather whether *as a matter of law* reasonable minds, as triers of the fact, *must* be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence * * * . If reasonable minds *could* find that the evidence excludes every reasonable hypothesis but that of guilt, the question is one of fact and must be submitted to the jury." *Cape* v. *United States* (CA 9), 283 F.2d 430, quoting from *Remmer* v. *United*

States, (CA 9), 205 F.2d, 277, 287. (Emphasis by the court).

The above rule has been stated several times in this circuit and elsewhere.

Weinstein contends that there was no *substantial* evidence of guilt; that all of the evidence was as consistent with innocence as with guilt; consequently, it was the duty of the trial judge to direct a judgment of acquittal for Weinstein.

In so saying, Weinstein recognizes that the evidence must be viewed in the light most favorable to the government. In reviewing the evidence, such will be done.

It is also recognized that on the question of a judgment of acquittal, the trial court could not weigh the evidence; that although the evidence adduced against Weinstein came almost exclusively from suspect and tainted sources generally unworthy of belief, nevertheless, all such testimony must be accepted as true and reliable *for this purpose.*

It is emphasized again that there is no direct evidence of any guilty involvement on the part of Weinstein. All evidence against Weinstein is circumstantial.

Out of the two months of trial, the chief claims against Weinstein were:

1. He represented, as attorney, a number of the people in the staged accidents.
2. He told the Deegans to exaggerate injuries and damages.

3. He paid money to some of the participants in the staged accidents.
4. He endorsed a draft and signed a release to the insurance company in settlement of the case for one of the participants in a staged accident.

A quick answer to these items is:

1. Representing persons with fraudulent claims can be done innocently; or it can be done with guilty knowledge.
2. Suggestions to clients to inflate injuries or damages can be for the purpose of building up a valid claim, as well as for other purposes.
3. Paying money to persons involved in accidents can be for loans, as well as for other purposes.
4. Signing a draft and a release for a client pursuant to a power of attorney can be and is a legal method of handling such matters; such is at least as likely an inference as is one of guilty knowledge of a fraudulent claim.

All possible identifiable claims against Weinstein under the evidence can be put under the following heads:

I. Weinstein had relationships of varying degrees with a number of the named defendants and and conspirators.

II. Weinstein paid large sums of money to some of the defendants, conspirators and other suspects.

III. George Barnard and other suspects told participants in staged accidents to see attorney Weinstein.

IV. George Barnard was a frequent visitor to his office.

V. George Barnard told the Deegans of the arrival of their settlement check from the insurance company.

VI. Defendants Knippel and Lasiter visited defendant Boisjolie following a telephone call to Weinstein from Boisjolie's "wife."

VII. Weinstein gave Deegan money to leave town at the time of the grand jury hearings.

VIII. Weinstein told Deegan to smash his car; feign and exaggerate injuries; recommended doctors who would be more favorable on injuries; told Deegan not to go back to work after his accident.

IX. Weinstein had no trouble finding defendant Giegerich for service by mail.

X. Weinstein questioned conspirator Rose about the facts of the accident.

XI. Weinstein simulated Saunders' signature and witnessed the same; the power of attorney.

Discussion of all of the above matters follows. All evidence will be viewed from the standpoint most favorable to the prosecution:

I

Weinstein's Representation Of, or Relation To, the Various Defendants and Conspirators.

A. Defendants

Defendant George James Barnard:

George Barnard appeared to be the leader of the staged accident group. He was the only defendant named in all nine counts of the indictment (R. 1).

Weinstein first met George Barnard February 1957 when Portland attorney, James Hafey, took Barnard to Weinstein's office. Hafey was Barnard's attorney. Hafey asked Weinstein to handle a case for Barnard inasmuch as Hafey had a conflict (XXII, 4314). Weinstein routinely filed and settled the case (XXIV, 4771).

January 1958, Barnard and Mrs. Barnard were involved in another collision. Weinstein filed complaints; the cases were settled September 1958 (XXIV, 4772).

February 1959, Barnard and Mrs. Barnard were involved in another collision. Weinstein did not file because he could not get a definite medical report. About a year later Mrs. Barnard became dissatisfied with Weinstein. The Barnards terminated Weinstein's representation and took the case to another lawyer (XXIV, 4772A-4775).

During this period of time, attorney Hafey continued also to represent the Barnards. He had two other matters for them during the same time Weinstein was representing them (XXII, 4316-4318).

There was no evidence that any of the above cases were improper.

Defendant Raymond Henry Knippel:

Prior to the time in question, Weinstein was consulted by Knippel concerning some minor business matters (XXVI, 5115).

January 17, 1959, Knippel was a passenger in a car owned and operated by conspirator Conrad Kerr. This car was struck in the rear by a car being operated by conspirator Alfred Wooldridge. This collision was not mentioned in any of the nine counts; evidence thereof was adduced in connection with the conspiracy count.

Knippel consulted Weinstein after the collision. Weinstein referred him to attorney Ben Gray (XXVI, 5116-5118).

Defendant William Mack Lasiter:

Weinstein represented Lasiter on property damage matters in 1958 and 1959. No claim was made that these were not legitimate (XXVI, 5073).

Defendant Darrel Wayne Saunders:

Saunders called Weinstein from Providence Hospital several days following the collision of September 11, 1958 (Count VI). Saunders had been put in a hospital room already occupied by Norman Fields, a long-time friend and client of Weinstein. At Saunders' request, Weinstein went to Providence Hospital (XXII, 4367-4372; XXIV, 4683-4685).

Weinstein represented Saunders and eventually settled his case for him (XXIV, 4711).

Defendant David Leon Boisjolie:

Weinstein represented Boisjolie's first wife (Joyce) and their two small daughters for injuries received in a collision in November 1958. He also represented Boisjolie on his claim for loss of consortium. Boisjolie testified it was an honest collision.

Weinstein also represented Boisjolie when his first wife (Joyce) sued Boisjolie for divorce in 1959. In all, Boisjolie was in Weinstein's office four or five times in connection with the divorce (VI, 1183; VII, 1295).

Defendants Leland Arthur Deegan and Geraldine Ruth Deegan, husband and wife:

The Deegans contacted Weinstein the day after their collision of September 11, 1958 (Count VI). The Deegans said George Barnard told them to see Weinstein (II, 253; IV, 674). Mrs. Deegan had been recommended to Weinstein earlier in the year by Irene Blair, a satisfied client of Weinstein. Mrs. Blair was a cook where Mrs. Deegan was a waitress (IV, 707, 708; XXIII, 4561-4565).

Weinstein filed actions for the Deegans and eventually settled their cases (II, 273).

Defendant Ronald Eugene Allison:

Allison drove the vehicle that was struck August 18, 1958 (Counts VII and VIII) (Ex. 431). Allison was hospitalized in Providence Hospital. An occupant of his

room was Elston Adams, a client of Weinstein. He recommended Weinstein to Allison (XXII, 4343, XXIV, 4750).

Weinstein was also recommended from another source. Allison's wife was a bank clerk. Robert Huffman, executive vice-president of Logan Oldsmobile, a large car dealer in Portland, did his banking at the bank where Mrs. Allison worked. She asked Huffman about a lawyer. She was having the Allison car fixed at Logan Oldsmobile following the collision. Huffman recommended Weinstein. Huffman had known Weinstein for a number of years and Weinstein had done legal work for him (XIV, 2630; XXIII, 4555-4560; XXVII, 5228, 5232).

Weinstein filed an action for Allison against defendant Giegerich and Wolfard Motor Co. and eventually settled the matter (Ex. 81; XIV, 2630, 2631).

Defendant John Norris Barnard:

Defendant John Barnard was a passenger in the Allison car at the time it was hit (Counts VII and VIII).

John Barnard and George Barnard were brothers. Weinstein came to know and represent them at different times and through different sources. He did not know they were brothers for sometime (XXIV, 4770).

About 1956, John Barnard was injured as an employee of Ross Island Sand & Gravel Company (XXIV, 4741). John Barnard asked Edward T. Mayes, a fellow employee, to recommend a lawyer. Weinstein had handled several cases for Mayes. Mayes recommended Weinstein (XXII, 4358-4363).

Barbara Barnard, wife of John Barnard, was later a client of Weinstein also. She was injured in a fall as an employee of S. H. Kress Co. in 1957. The insurance carrier stopped her compensation payments so she consulted Weinstein. The matter was settled in 1959 (XXIII' 4586-4589).

Thereafter, Barnard received another injury as an employee of Ross Island and brought an action against Ross Island. Weinstein represented him again (XXIV, 4743). This last case was settled May 1958 (XXIV, 4602), just a few months before the collision of August 18, 1958 (Counts VII and VIII).

No question was raised as to the legitimacy of any of these three claims.

Barnard went to Weinstein again after the August 18, 1958, collision.

Weinstein filed an action for John Barnard against defendant Giegerich and Wolfard Motor Co. at the same time he filed the action for Allision; it was settled (Ex. 82, XIV, 2631).

Defendants Arthur Roscoe Smith and Larry Warren Haynes:

These defendants were involved in Counts I and II. Both were government witnesses on guilty pleas. Both denied all knowledge of Weinstein (XV, 2843; XVIII, 3465).

Defendants Patricia Ann DePlois, Donald William Johnstone, and Charles Harry Giegerich:

Weinstein had no connection with any of the above three.

Defendants DePlois and Johnstone were the drivers of the two vehicles involved in the collision giving rise to Count III.

Giegerich drove the vehicle which struck the Allison vehicle August 18, 1958 (Counts VII and VIII) (Ex. 431). Weinstein brought an action against Giegerich and Wolfard Motor Co. on behalf of John Barnard, Allison and Page (Exs. 81, 82, 83).

B. Conspirators Named in Indictment (Count IX)

Conspirators Ronald A. Miller, and Dennis Dunham:

Miller and Dunham were occupants of the car that was hit October 16, 1958 (Counts IV and V) (VI, 1054). They did not testify.

Originally they saw Weinstein. Shortly thereafter, attorney Ben Gray became their counsel upon referral of Weinstein (XXIV, 4717-4720).

Conspirator Gordon L. McCoy:

McCoy was another passenger in the vehicle which was struck October 16, 1958 (Counts IV and V). He was a government witness. He testified that George Barnard handed him Weinstein's card shortly before the

collision and told him to see Weinstein, (this is discussed infra, part III, this Specification).

Like Miller and Dunham, he was originally represented by Weinstein. Shortly after, he became a client of attorney Ben Gray, who filed an action for him (IX, 1677; XXIV, 4717; Ex. 27).

Conspirator Esther Howerton:

Mrs. Howerton was owner and occupant of the car that hit the Deegan car September 11, 1958 (Count VI). Defendant Boisjolie drove the car. She testified as a government witness (V, 845-850). She was in Weinstein's office once to talk about Boisjolie's divorce (V, 857).

Conspirator James W. Page:

Page was the third occupant of the Allison car (Counts VII and VIII). Page was hospitalized in Providence Hospital along with Allison in the same room occupied by Elston Adams, a former client of Weinstein. Adams recommended Weinstein. Weinstein represented Page, filed an action for him which was eventually settled (Ex. 83; XXIV, 4750, 4751).

Conspirators Richard Sanseri, Donovan S. McCoy, Ann L. Kimmel (Stewart) and Lewis Swertfeger (Scott):

Sanseri testified as a government witness that he did not know Weinstein (XV, 2907). Donovan McCoy did not mention Weinstein. Both were involved in Counts I and II.

Kimmel (Stewart) testified as a government witness

that she did not know Weinstein (X, 1960). She was involved in Count III.

Swertfeger (Scott) testified as a government witness. He was the striking driver of the car in Counts IV and V (Exs. 27, 28, 29, 30). There was no indication he knew Weinstein.

C. Conspirators Named Only in Answer to Weinstein's Request for Bill of Particulars

The indictment alleged that there were "unknown" conspirators (R. 7). Weinstein sought the names, and in answer thereto the government furnished the following additionally named persons (R. 73):

Conspirator James F. Barnard:

James Barnard (this is a third Barnard) was a passenger in the car that was struck January 17, 1959 (XVII, 3222). This collision is not mentioned in the indictment. He was not called as a witness.

Conspirator Conrad Kerr:

Kerr was the driver of the vehicle that was hit January 17, 1959. Kerr testified as a government witness (XVII, 3222). He testified he did not know about the collision being staged (XVII, 3248). He called Weinstein from the hospital, but Weinstein did not see him. Weinstein referred him to attorney Ben Gray. Kerr came to see Weinstein at his office several times (XVII, 3224, 3267).

Conspirator Alfred Wooldridge:

Weinstein represented Wooldridge in connection with a collision December 6, 1958. Wooldridge, a government witness, testified it was a legitimate collision (XVI, 3157).

Wooldridge left town before Weinstein filed a complaint and never returned. He dropped out of sight (XXV, 4867-4869).

Wooldridge was the driver of the car that struck the Kerr car January 17, 1959 (XVI, 3113).

Conspirator Catherine Barnard:

This is apparently Mrs. George Barnard. She did not testify. Weinstein represented her, along with George Barnard, in an accident in 1958 and another in 1959, which eventually was taken away from Weinstein at her insistence (XXIV, 4772-4775).

Conspirator Keith I. Rose:

Rose drove the car which was struck October 16, 1958 (Counts IV and V). Rose testified for the government.

Rose said that Weinstein came to see him at the hospital and told Rose that the other boys (McCoy, Dunham and Miller) were represented by him and wondered if Rose wanted him (IX, 1755). He said Weinstein also wanted to talk to him because Rose was the driver (X, 1841).

Weinstein referred Rose along with the other occupants of Rose's car to attorney Ben Gray (X, 1844).

Gray filed action for Rose (Ex. 29). His case against Swertfeger was tried in circuit court, resulting in a judgment for Rose. (X, 1852).

The foregoing summary covers all defendants, conspirators named in the indictment, and conspirators named in the bill of particulars. Certainly there is nothing in the foregoing that would be considered substantial evidence of guilty knowledge on the part of Weinstein. Representation of bad men has not come to be an indication of guilt on the part of the attorney. Nor is the fact that a bad man recommends an attorney evidence that the attorney himself is a bad man.

II

Weinstein Paid Large Sums of Money to a Number of Defendants, Conspirators and Other Suspects.

The fact that Weinstein paid out money to a number of the persons named as defendants and conspirators gave rise to a government attempt to show that Weinstein had guilty knowledge. The government attempted to show that Weinstein was the "pay-off" man.

Each individual case will be taken up where any money was ever paid. It will be noted that *every payment was either a loan or in final settlement of a lawsuit or claim.*

Weinstein called two well-qualified Portland attorneys as expert witnesses. Attorneys Nels Peterson and John Ryan testified that it had been the approved cus-

tom for many years among Portland attorneys having personal injury cases to advance sums of money to their clients prior to settlement or judgment, (XXIV, 4645; XXV, 4930). *There was no evidence to the contrary.*

The following named persons are all those to whom Weinstein paid any sum of money:

Defendants Leland and Geraldine Deegan:

Weinstein loaned the Deegans money all during the time their cases were pending. In addition, he paid a number of traffic fines for Deegan. Weinstein also paid their doctor and hospital bills, and advanced the costs of filing, All of these amounts were deductcd after the Deegan cases were settled with the insurance company for $3,750. The amounts advanced, together with the cash paid at the time of the settlement, amounted to over $2,600 for the Deegans. The remainder was for the attorney fee (contingent), less than one-third. Deegan referred to the various amounts paid by Weinstein as "loans", and they were treated as such (III, 465-472).

There was nothing in the testimony of either of the Deegans to indicate that there was any "pay-off". Actually, Weinstein treated the Deegans very kindly.

Considering the government's theory that Weinstein was the "pay-off" man and that the Deegans were the principal witnesses for the government against Weinstein, Mr. Deegan's testimony is significant.

Defendant David Leon Boisjolie:

This man started early to cooperate with the gov-

ernment, although he was named as a defendant. He signed a confession October 10, 1960 (VI, 1187). He was a prime government witness.

Boisjolie and his first wife (Joyce) borrowed money from Weinstein in connection with her accident of November 1958, in which she and their two small daughters were injured. It was all repaid on settlement of the case (VII, 1353, 1354). Boisjolie testified it was a legitimate accident (VII, 1290).

One other check was given by Weinstein to Boisjolie. This was developed in a most significant manner by the government. The government put in evidence a photostat of a Weinstein check for $210 to Boisjolie dated September 27, 1960 (Ex. 32-D; VII, 1359-1363). The government also put in evidence that just two weeks later it had been suggested to Boisjolie that he *obtain money from Weinstein* so he could leave town for the heat was on (VII, 1206-1209, 1373-1375; see Specification of Error No. VI, infra 120).

But on cross-examination, Boisjolie admitted that the check (Ex. 32-D) was given to him by Weinstein at his request *as a loan* to buy necessities for his two daughters who had been left with him by his former wife Joyce, and to make a payment on some furniture, and for no other purpose. He signed a note for the $210 at the same time (Ex. 416-B; VII, 1297, 1298, 1364, 1365). Weinstein then put the original check for $210 into evidence (Ex. 416-A).

Boisjolie's admission is most revealing. *The government built much of its case around Boisjolie. It used*

him in getting the sham indictment of Deegan for intimidation of Boisjolie several days before the trial (R. Vol II, 242). This indictment with attendant incarceration and circumstances was used to coerce a confession out of Deegan (see Specification of Error No. III, infra 88). *Thus, the importance of the admission by Boisjolie that the check* (Exs. 32-D; 416-A) was a *perfectly innocent and legitimate loan by Weinstein for humanitarian purposes, rather than something bad and sinister, cannot be overemphasized.* The build-up by the government all pointed toward a desired conclusion that Boisjolie got the $210 so he could leave town.

Viewing the above testimony in any light gives absolutely no encouragement to the government's theory that Weinstein was "pay-off" man for the group.

Conspirator Gordon L. McCoy:

On his second visit to Weinstein as a client, Gordon McCoy asked Weinstein to loan money to him; Weinstein asked him what he needed it for; McCoy said for a car payment; Weinstein did loan him money then and also on his next visit (VIII, 1593, IX, 1679).

Thereafter, Weinstein told McCoy and the other people in that collision (Counts IV and V) that he could not represent them and took them over to attorney Ben Gray. McCoy asked Gray to loan him money and Gray said to see Weinstein. At one time Weinstein loaned McCoy money for a traffic ticket of $20 (VIII, 1597; IX, 1680). Weinstein tried to slow McCoy down on borrowing; at one time told him he was having heavy

expenses because his son had had a stroke (IX, 1681). Weinstein's loans are shown by checks (Exs. 421-A - H). McCoy borrowed about $600 (IX, 1684).

On settlement of McCoy's case for $1,750 (IX, 1618), he paid back Weinstein *all of the money he had borrowed*. McCoy testified as follows:

> "Q And will you tell us what transpired on the occasion of that visit?
>
> A I was picking up the check for my settlement that Ben Gray had got, and I had to pay Mr. Weinstein back the money I borrowed from him." (VIII, 1600)
>
> * * * * *
>
> "Q But he continued to loan you money, didn't he?
>
> A Yes, he did.
>
> Q And you continued asking for it?
>
> A That is right.
>
> Q And then as I recall, that as soon as your case was settled with the insurance company, as part of the settlement that deducted from your share was the amount of money that Mr. Weinstein had loaned you?
>
> A That is correct" (IX, 1682).
>
> * * * * *
>
> "Q Did you have a genuine need for that money when he loaned it to you?
>
> A On a few occasions, yes.
>
> Q And you so indicated to him, didn't you?
>
> A Yes, I did." (IX, 1685)

This was another instance of a surly and hostile government witness over whom the government had complete control, who admitted that the money paid to him was entirely legitimate, innocent and for no ulterior purpose. The significance of his testimony on

the matter of loans cannot be overestimated in light of the direction the government attempted to point, and the type of witness involved.

Conspirator Keith I. Rose:

Rose borrowed money from Weinstein four or five times before Weinstein turned the case over to attorney Gray (IX, 1771). Rose borrowed money often. He had lots of bills (X, 1847, 1848). He borrowed about $380.

The money was all paid back on settlement of Rose's case (X, 1849, 1853). Rose testified as follows:

> "Q In connection with those loans, these checks here that the Bailiff has here that we have just been talking about, it was understood at the time those loans were made that the money was to be paid back, wasn't it?
>
> A Oh, yes, sir." (X, 1853)

Here is another hostile government witness who had no reason to give Weinstein a break and who had every reason to go along with the government investigators. Rose was at the mercy of the government. The fact that he failed to indicate the slightest irregularity concerning the payments is of utmost significance.

Defendant John Norris Barnard:

Prior to the collision of August 18, 1958 (Counts VII and VIII), Weinstein represented John Barnard on two cases against Ross Island Sand & Gravel Company. The last Ross Island case was settled May 1, 1958. Prior to settlement, Weinstein loaned John Barnard a substantial sum (XXIV, 4604; Exs. 150-A - D; 151-A - I). It was all repaid on settlement (XXIV, 4608).

John Barnard's wife, Barbara Barnard, was hurt in 1957 working at the S. H. Kress Company. She drew compensation through Liberty Mutual Insurance Company on a compensation agreement. Four months later the payments were stopped by Liberty Mutual. She went to Weinstein. An action was brought against Liberty Mutual which was finally settled in November 1959 (XXIII, 4586-4589; XXIV, 4767, 4768; Exs. 484, 495-A, B and C).

After John Barnard's Ross Island case was settled May 1, 1958 (see first paragraph above), Mrs. Barnard borrowed sums of money from Weinstein on four different occasions. She was sick, pregnant, and confined to her home. She asked Weinstein to make out the checks to her husband, which he did (XXIII, 4589-4598). The government put in photostats of three of these checks as part of its case (XVI, 3051; Exs. 108, 109, 110). Weinstein thereafter put in all four original checks. They are dated July 7, July 22, July 31 and August 8, 1958 (Exs. 485-A-D; XXIII, 4598).

There is no further testimoney concerning these four checks. It will be noted they were written subsequent to the settlement of the Ross Island case (May 1), and prior to the August 18 collision. The government theorized they were *prepayments* by Weinstein to Barnard on the collision of August 18, 1958 (Counts VII and VIII). The uncontradicted testimony is that the four checks were all for a proper and innocent purpose (XXIV, 4607, 4608; XXV, 4995). Such would have been a reasonable inference for a reasonable jury to draw.

Mrs. Barnard previously borrowed other sums from Weinstein also on her claim (XXIII, 4600; Ex. 149).

All sums borrowed by Barbara Barnard were paid back on settlement of her claim against Liberty Mutual Insurance Company in 1959 (XXIV, 4608).

Subsequent to the collision of August 18, 1958 (Counts VII and VIII), John Barnard started borrowing money again from Weinstein (Ex. 110-A-110-HH). Upon settlement, all sums borrowed were repaid to Weinstein and deducted from the amount received by John Barnard (XXVII, 5334).

The jury could have reasonably inferred that the amounts of money Weinstein paid to John and Barbara Barnard were for an innocent purpose—in fact, humanitarian. Barnard had four children. Both parents were out of work for months.

Conspirator Conrad Kerr:

Kerr was injured in the collision January 17, 1959. He asked Weinstein to represent him. Weinstein referred him to attorney Ben Gray. He borrowed from Weinstein four or five times while his claim was pending. Kerr testified as a government witness. He understood the money was a loan to be paid back when the case was settled and signed a note. Upon settlement of his case the full amount loaned by Weinstein to Kerr was repaid to Weinstein (XVII, 3226, 3269, 3270).

Defendant Darrel Wayne Saunders:

Saunders did not testify. The government put in no evidence concerning loans to Saunders.

Weinstein testified that he loaned Saunders $30 at Saunders' request when he visited him at the hospital September 17, 1958, shortly after the collision (Count VI) (XXIV, 4709).

Weinstein loaned Saunders about $1100. (XXVI, 5164). Saunders gave Weinstein a power of attorney (Ex. 488) which authorized Weinstein to settle the case against Esther Howerton and to repay himself from the settlement for the loans which he had made (XXIV, 4711). Settlement was made about March 15, 1960, and the entire amount of the loan was repaid along with the medical and other outstanding bills of Saunders (XXVI, 5164).

Defendant Ronald Eugene Allison:

Here again, as in the case of Saunders, the government put in no evidence concerning loans to Allison. Allison did not testify.

Starting September 13, 1958, periodic loans were made by Weinstein while Allison was not working until final settlement in October 1959 (Exs. 500-A-H; XXV, 4999; XXVI, 5003), at which time Allison received $2,810 (Ex. 500-I, J).

Conspirator Alfred Wooldridge:

Wooldridge testified as a government witness. He had been involved in a legitimate collision December 6, 1958. He went to Weinstein. On four occasions between December 18, 1958, and March 23, 1959, Wooldridge borrowed money from Weinstein (XVI, 3130, 3161; Exs. 443-A-D).

Wooldridge testified that all money that he borrowed was to be paid back when he settled the collision of December 6, 1958 (XVI, 3161). However, before any action was filed, Wooldridge left Portland, (XVI, 3173, 3174).

In the meantime, Wooldridge drove the vehicle January 17, 1959, which struck the Kerr automobile (XVI, 3122).

After he left Portland, Wooldridge called Weinstein from Cheyenne and told Weinstein he needed money—that he was getting married. Weinstein sent him $50 (XVI, 3134, 3135). After receiving the $50 in Cheyenne, Wooldridge never contacted Weinstein again (XVI, 3178).

The only reason that the Wooldridge loans were not repaid is because Wooldridge never signed the complaint. Weinstein had prepared the complaint (XXV, 4869; Ex. 497).

Defendant George James Barnard:

The government put in no evidence of loans to George Barnard in its case in chief. All evidence concerning such came from Weinstein.

Barnard and Mrs. Barnard were involved in a collision January 10, 1958. Weinstein, as their attorney, loaned Barnard money (Exs. 154, 155-A - J). This amount was all paid back to Weinstein when the case was settled later in the year (XXVI, 5172).

In early 1959, George Barnard and Mrs. Barnard

were involved in another collision. From March 6, 1959 to October 21, 1959, Weinstein made four loans to Barnard (Exs. 155-K - N). In February 1960, Mrs. Barnard became dissatisfied with Weinstein. The cases were taken out of Weinstein's office to another lawyer (XXIV, 4775). The cases were still pending at the time of trial. Consequently, Weinstein had not been repaid the loans as shown by Exhibits 155-K - N (XXVI, 5172).

A reasonable jury could reasonably find that all sums of money paid by Weinstein to George Barnard were paid pursuant to the prevalent practice in Portland at that time.

Defendant Raymond Henry Knippel:

Knippel did not testify. All testimony concerning loans to Knippel came from Weinstein.

Knippel had previously been a client of Weinstein (XXVI, 5115). Knippel came to Weinstein after the collision of January 17, 1959. Weinstein referred him to attorney Ben Gray (XXVI, 5118). When Knippel asked Gray for a loan, Gray sent him to Weinstein. Weinstein loaned money to Knippel on two occasions during the pendency of the matter (Exs. 158-A - B; XXVI, 5120). Knippel gave a note (XXVI, 5121). Upon settlement of Knippel's case with the insurance company, Knippel repaid the loan in full (XXVI, 5169).

Defendant William Mack Lasiter:

Lasiter did not testify. All testimony concerning Lasiter's finances came from Weinstein.

Weinstein represented Lasiter on a matter which was settled in March 1959. Lasiter recovered $2500. (Ex 159-A; XXVI, 5121).

In June 1959 Lasiter's car was damaged. Weinstein handled the claim and loaned Lasiter $200 pending settlement. Upon settlement Weinstein was repaid (XXVI, 5123, 5124; Ex. 159-B).

Government Witness Robert Perrin:

This subject of Weinstein's payment of sums of money to various defendants and conspirators cannot close without discussion of Robert Perrin. The trial proceeded during the months of September, October and November. Each month Perrin appeared as a government witness.

Perrin was an adjuster for Iowa National Insurance Company. Perrin testified in September as to the settlement with Weinstein of the claims of the Deegans and Saunders (Count VI) (VI, 1029).

In October Perrin made his second appearance. Perrin said that October 19, 1960, between 3:30 and 4:00 p.m., he met Weinstein in front of a specific building (XVI, 3002, 3003). Perrin said he and Weinstein were talking about attorney Herbert Black. Black was in the process of disbarment proceedings with the Oregon State Bar at the time (XVI, 3006). Perrin testified that Weinstein told him as follows:

> "Q Mr. Perrin, on the occasion of that meeting will you tell us what was said by Mr. Weinstein to you concerning himself?

A He told me, 'I am not an attorney, I am just a banker. You never saw a banker go to jail, did you? They will never get me. They will get some of the small fry in this matter, but they will never get me.' " (XVI, 3022).

In the first place, it is obvious that Weinstein could not have been referring to the indictment in this case. It was a secret indictment, not filed until January 20, 1961 (R. 1, 10; XVI, 3017).

The government's theory being what it was, certainly this was prejudicial testimony. Did this constitute evidence that Weinstein had knowledge that the collisions were being staged?

On cross-examination Perrin testified that he had been in the adjusting business for five years; that he had done more business with Weinstein than any other lawyer in the State of Oregon (XVI, 3030-3034). He and Weinstein had been kidding each other as they often did, and Perrin himself did not take Weinstein seriously, nor did he think that Weinstein was serious when he told him that he was a banker (XVI, 3034-3036):

"Q So, what Mr. Weinstein told you, you say he told you that he wasn't an attorney, you didn't take that seriously, did you?

A Honestly, it was just a general conversation, we were semi-kidding about the thing, that is correct.

Q That is what I thought. Mr. Weinstein is, when he talks to people, he tends to be quite jovial and joking at times, doesn't he?

A With me, yes." (XVI, 3034).

* * * * *

"Q And when Mr. Weinstein said he was a

banker, as you say, you didn't seriously think he was a banker, you didn't think he was seriously telling you that he was a banker, did you?

A No.

Q And when he said or words to this effect, 'That you never saw a banker go to jail, did you?' that was said in a rather joking tone of voice, wasn't it?

A Yes, it was." (XVI, 3035)

A reasonable jury could reasonably conclude that Weinstein was joking and kidding with Perrin, as Perrin himself so concluded. It is not evidence of any knowledge regarding staged collisions.

The foregoing covers the testimony concerning money paid by Weinstein to any person connected with the indictment. Looking at the testimony from the standpoint most favorable to the government, it is as reasonable to conclude that Weinstein was making legitimate loans to needy clients as to conclude Weinstein was aware of the improper nature of the collisions involved.

If further evidence concerning the propriety of loans to clients by attorneys is indicated, it is furnished by Exhibits 501-A - D.

Elston Adams was a client of Weinstein (XXIV, 4750). Needing money, Weinstein loaned him a total of $2,005 over a period of about a year and a half in small payments. Adams died just after his case was settled but before payment. Adams' estate was probated in Multnomah County Circuit Court. Adams' only asset was the settlement. Weinstein filed a claim for $2,005, set-

ting forth in detail exactly what it was for. *It was approved by the court and paid in full upon court order* XXV, 5000; XXVI, 5001 (XXVII, 5204-5206; Exs. 501-A - D). Attention is particularly invited to Exhibit 501-A.

III

George Barnard and Others Told Participants in Staged Collisions to See Weinstein.

There was considerable evidence that defendant George Barnard was the moving force setting up the staged collisions. There was hearsay testimony by several participants of staged collisions that George Barnard told them to retain Weinstein as their attorney.

Without independent evidence of Weinstein's participation, which there was not, such evidence was not admissible. — Barnard usually designated a doctor also. The testimony concerning this phase is as follows:

1. The Deegans both testified that Barnard told them to see Weinstein and Dr. Joe Davis following their collision (Count VI) (II, 253; IV, 674); Mrs. Deegan said Barnard told her arrangements had all been made with Dr. Joe Davis (IV, 606).

2. Conspirator Gordon McCoy testified that just before the collision (Counts IV and V), George Barnard gave to McCoy the business card of Weinstein and that of the Orthopedic & Fracture Clinic (Ex. 420; VIII, 1575; IX, 1659, 1660). Barnard told McCoy and the other three in this car that Dr. Davis and Dr. Cherry

(of the Orthopedic & Fracture Clinic) were in on it (IX, 1661-1663); that if they followed Dr. Cherry's instructions each would get $10,000 - $15,000 (IX, 1668).

As for the card of the Orthopedic & Fracture Clinic, McCoy had been carrying it around for three years up to the time he pulled it out of his billfold at the trial (IX, 1668). Dr. Joe Davis identified it as a card of the Orthopedic & Fracture Clinic (XXII, 4395).

Barnard told McCoy he was an ex-policeman with lots of connections; that he was top man; some of the biggest lawyers and doctors in Portland—biggest names in Portland were in on it; lots of people being paid off (VIII, 1557; IX, 1673).

3. Keith Rose testified that George Barnard told him and the other participants (Counts IV and V) "to see a certain Mr. Weinstein for an attorney after the accident" (IX, 1733). He also said that Barnard told each of them to see a certain doctor. Barnard told Rose to see "Dr. Davis". He also mentioned Dr. Cherry (IX, 1734; X, 1810, 1828).

Rose stated that Barnard told him before the collision (Counts IV and V) there was nothing to worry about, that the wreck was set up including doctors, lawyers and *hospitals* (IX, 1740; X, 1816, 1846).

4. Swertfeger testified that before the collision (Counts IV & V) George Barnard said that the doctors had been taken care of, and that Weinstein was to handle the case (VIII, 1422). In his statement to the government, he said that Barnard had told him the

insurance people, doctors, lawyers and policemen were all lined up. The only name he could remember of all these groups was Weinstein's (VIII, 1477).

5. Boisjolie testified that George Barnard told Esther Howerton the accident was all planned (Count VI); that the *hospitals knew they were coming along with the doctors;* that the syndicate had it fixed (VI, 1100; VII, 1268, 1273-1275). Boisjolie did not know which hospitals had been alerted in advance of the collision (VII, 1268).

6. Inspector Severtson testified that defendant Allison told him George Barnard had told Allison (double hearsay) that the *doctors, lawyers, hospitals, police* and *insurance* companies were all fixed up in connection with these accidents (XV, 2997, 2998).

7. George Barnard also told defendant Haynes (XV, 2842), Sanseri (XV, 2899), and Donovan McCoy (XVII, 3372) that the doctors and lawyers were all arranged. (Counts I and II in February 1960.) Different doctors (XV, 2843; XVII, 3372), lawyers (XV, 2903), and hospital (XV, 2852) were named.

Dr. Joe Davis and Dr. Howard Cherry are orthopedic specialists of the highest qualifications and reputation in the Portland area (XXII, 4380-4384; XXIII, 4427-4435, 4486-4490). Both doctors are beyond all suspicion. They perform much of their work for insurance companies and the State Industrial Accident Commission (XXIII, 4434, 4435). They are paid by insurance companies to treat and examine many Longshore patients

(XXIII, 4429). Dr. Cherry was also chairman and senior member of the Portland School Board.—Yet their Orthopedic & Fracture Clinic was recommended by George Barnard to over half of the defendants and conspirators! (See Appendix 170, Drs. Joe Davis, Cherry and Fitch.)

Like Weinstein, the Orthopedic & Fracture Clinic handled a large volume of business (XXIII, 4402).

Both doctors testified it would have been relatively easy for anyone to get hold of a number of their cards in the waiting room and other places (XXII, 4396, 4397; XXIII, 4496, 4497).

Mr. Deegan testified that George Barnard had told him never to tell Weinstein that he (Deegan) knew Barnard:

> "Q And at somewhere along the line didn't Mr. Barnard, Mr. George Barnard, tell you and your wife that you should not ever tell Phil Weinstein that you had been talking to him?
>
> A Yes.
>
> Q Isn't that right?
>
> A Just right there, right around the office, or something, yes.
>
> Q In other words, Mr. Barnard indicated to you and your wife that he didn't want you to tell Phil that you and your wife had been talking to him?
>
> A That is right." (III, 464)

Both Mr. and Mrs. Deegan also told this to their attorney, Ray Carskadon (XXVI, 5181, 5185).

A recommendation by someone like George Barnard is not tantamount to guilty knowledge. The prosecutor

appeared to agree that the recommendations did not implicate the doctors (XXIII, 4431).

It was logical for George Barnard to recommend Weinstein. Barnard knew Weinstein had a big personal injury business—that he was understaffed—that he got along with insurance adjusters—that he settled a lot of cases. (See Appendix 173-175, 182).

George Barnard would want a lawyer like that. One that would settle such cases fast, rather than expose them to the scrutiny of investigation, medical exams, depositions and trial. He would want a lawyer that handled a large volume of business so as not to attract attention of insurance companies or of the lawyer himself. He would want a lawyer who would get things done quickly without much investigation so that his actors, and he himself, could get out fast.

Exhibit 499 shows the volume of business that Weinstein did in eight months from July 1958 to February 1959. This covered the period of the four collisions involving Weinstein. During that eight-month period Weinstein took in 106 legitimate cases which eventually grossed over a quarter of a million dollars, and netted him in the neighborhood of $64,000 (XXV, 4894-4898).

It is significant, however, that of the four cases in which Weinstein was involved, there was not one fast settlement. All were filed in court; none were settled in less than a year; depositions and insurance medicals were taken in four collisions; one case was actually tried and won.

Contrast the fast settlements of Counts I and II (accident February 18, 1960 - settlement May 5, 1960) (Ex. 131), and Count III (collision September 5, 1959 - settlement December 2, 1959) (Ex. 80). No actions were filed, no depositions were taken, no insurance medical examinations given. Weinstein had nothing to do with either of these cases.

Weinstein obviously had nothing to hide—*no guilty knowledge*. The cases all got the full treatment before settlement.

IV

George Barnard Made Frequent Trips to Weinstein's Office.

Witness Carol Poole was Weinstein's secretary from December 1958 to July 1959 (VI, 1045). She testified that George Barnard was in Weinstein's office once or twice a week (VI, 1046).

This should not be surprising. Barnard was Weinstein's client, having been brought to Weinstein's office by attorney James Hafey. Thereafter, Weinstein handled several cases for Barnard (Part I, supra).

Obviously, a reasonable jury could reasonably find that visits to Weinstein's office by Barnard were in connection with Weinstein's representation of Barnard as attorney.

V

George Barnard Told the Deegans That Their Check Had Arrived.

Mrs. Deegan testified that they learned of the arrival of the settlement check in Weinstein's office from George Barnard (IV, 644). Recognizing that Barnard was a client in Weinstein's office and was there rather frequently (Part IV, supra), this is not surprising.

The Deegans testified (Part III, supra), that George Barnard told them never to tell Weinstein that they (the Deegans) knew Barnard or were talking to him (III, 464; XXVI, 5181, 5185).

The foregoing as clearly indicates innocence to a reasonable jury as it does guilty knowledge.

VI

Defendants Knippel and Lasiter Visited Defendant Boisjolie Followng a Telephone Call From Boisjolie's "Wife" to Weinstein.

The propriety of admitting this testimony is fully discussed (infra, Specification of Error No. VI). The admission was error.

Assume, however, that it was properly admitted. The testimony is all set forth in detail (infra 120-125). To briefly summarize, Boisjolie was taken by government investigators to the Federal Building. He told his "wife" Edith Thomas to call his lawyer. She called Weinstein. Shortly after, defendants Knippel and Lasiter came to

her home, told her to tell Boisjolie to keep quiet. Later they told Boisjolie to get money from Weinstein to leave town.

The implications the government desired to have drawn were:

1. That upon receiving the telephone call from Edith Thomas, Weinstein had called Knippel and Lasiter, who thereupon went to tell Boisjolie to leave town and keep quiet. — However, Boisjolie in his confession signed October 10, 1960, stated that Knippel and Lasiter had been to their house for the past several weeks, at least three or four times a week, trying to find out who had been contacting Boisjolie (VII, 1350, 1351).

2. That Boisjolie got money from Weinstein to leave town. — Of course, Weinstein had given Boisjolie a check (Ex. 34-D) just a few days before (September 27, 1960). However, Boisjolie admitted this was given to him by Weinstein as a requested loan for taking care of his children and making a payment on his furniture (supra 30).

Even if the testimony had been properly admitted, a reasonable jury could as easily have inferred innocence as guilty knowledge on the part of Weinstein.

VII

Weinstein Gave Deegan Money to Leave Town at the Time of the Grand Jury Hearings

Deegan testified that about August or September 1960, he went to Weinstein's office, mentioned that he had

talked to a postal inspector and was worried about Mrs. Deegan "telling something". He said Weinstein said to get her out of town; later he received money from him; thereafter the Deegans went to Seattle (II, 300, 301).

Government counsel then asked Deegan as follows:

"Q. Did you tell Mr. Weinstein or make any statement concerning the nature of the accident, as to whether it was unintentional or intentional, on the occasion of this conversation?

A. No.

Q. Did you at the time of your interview with Postal Inspector Severtson and City Detective Harvey, did you receive from them any statement which you repeated to Mr. Weinstein concerning the staging of the accident, do you understand the question?

A. No, no, no." (II, 302, 303)

On cross-examination Mr. Deegan testified as follows concerning his conversation with Weinstein:

"Q. And you said to the effect that he told you when Mr. Severtson talked to you that he was merely bluffing, or something to that effect?

A. Yes.

Q. At that time that you talked to Mr. Weinstein before you were called before the grand jury, did you tell Mr. Weinstein that this was not a legitimate accident, did you tell him at that time?

A. No, I didn't understand that, will you ask that again?

Q. I say, at the time that you called Mr. Weinstein and told him that you had been contacted by Mr. Severtson, did you tell him that this was not a legitimate accident, in fact?

A. No, I didn't, no, I didn't.

Q. All right, and then you were called before the grand jury and you denied everything there, you say?

A. Yes." (III, 480)

Deegan also testified as follows concerning Weinstein:

"Q. When you and your wife left Mr. Weinstein's office after having talked to him for some considerable time when you first saw him there, didn't your wife say to you, in effect, that she was convinced that Phil did not know that there was anything wrong with this accident, didn't that conversation take place?

A. She mentioned something to that, but I don't believe it was the first day or anything like that. It may have been the first day, I remember she said something pertaining to that, yes.

Q. Somewhere along the line?

A. Somewhere along the line." (III, 463, 464)

Deegan further gave the following very significant testimony:

"Q. Now, Mr. Deegan, you and I already discussed this conversation that I had in the presence of your attorneys with you and Mrs. Deegan in Mr. Carskadon's office on, I think, September 12, 1961, you remember that, of course?

A. Yes, I do.

Q. Let me ask you if it isn't a fact that at that time you told me in the presence of Mr. Carskadon and your wife and that your wife agreed that the only thing that you knew concerning Phil Weinstein in this entire case was that Mr. Barnard had suggested that he come up to see you or that you go up to see him?

A. Are you asking me?

Q. Wasn't that stated at that time by you and your wife in the presence of me and Mr. Carskadon?

A. I may have said that, but like I said, that I shouldn't have been talking to you in the first place.

Q. Well, we were very friendly up there?

A. We were friendly, yes.

Q. And we were just sitting there, standing around there talking, weren't we?

A. That is right.

Q. And your attorney was there and we were just talking back and forth about the facts of the case, weren't we?

A. That is right.

Q. And you were not under any compunction to talk to me, were you, as a matter of fact, didn't I ask you if you objected to talking to me?

A. I don't remember that, you may have.

Q. But you didn't feel under any pressure or stress, did you, as you were talking to me there in the presence of Mr. Carskadon?

A. No." (III, 472, 473)

As for Mrs. Deegan, she testified as follows on cross-examination concerning Mr. Weinstein's guilty knowledge:

"Q. Do you remember telling me in Mr. Carskadon's office at the time we were talking there you were convinced at the time you talked to Mr. Weinstein that he knew nothing about the facts of this accident?

A. Yes, I remember telling you that.

Q. And don't you remember telling me that at the time you left Mr. Weinstein's office with your husband after you first talked to Mr. Weinstein that you told your husband that at that time you were convinced that he did not know that it was not a legitimate accident?

A. Yes, I did." (IV, 709, 710)

The conversation just referred to above was with Weinstein's attorney in the office of Mr. and Mrs. Deegan's attorney and in the presence of their attorney. This conversation was September 12, 1961, the day prior to the commencement of this trial (IV, 709, 710).

In further reference to the conversation in Mr. Carskadon's office, Mrs. Deegan testified as follows:

"Q. Mrs. Deegan, do you recall telling me at the time in Mr. Carskadon's office on the 12th day of

> September of this year at this conversation we were talking about, substantially the following: That there was absolutely nothing as far as Phil Weinstein was concerned in this case and that you were convinced that the first he knew about it was last Saturday when you told him about it in his office?
>
> A. Yes." (IV, 718)

The court's attention is also invited to the testimony of Ray Carskadon, attorney for the Deegans (XXVI, 5180, 5181).

It is noteworthy that the government did not ask Mrs. Deegan anything about a loan from Weinstein for the purpose of going to Seattle, and she mentioned nothing concerning the matter—nor did she say anything about going to Seattle.

Mrs. Deegan signed the statement for the FBI just before the start of the trial as follows:

> "A. 'My husband and I did go to see Weinstein the following day and took down information concerning the accident.'
>
> Q. Go ahead.
>
> A. 'He did not indicate that he knew the accident was a phoney one, we did not tell him.' " (IV, 689)

Deegan, as Weinstein well knew, had been in much trouble with the law for years. Weinstein had represented him in connection with some of his troubles with the law and loaned him money to pay fines (Exs. 503-A-E; III, 467-470; XXVII, 5208-5210; XXIX, 5668). Weinstein had loaned Deegans much money during the pending of their law actions (III, 465-469).

An inference that any money Weinstein may have given Deegan was for a loan or for any one of a variety

of purposes was as reasonable a one to be drawn as that Weinstein gave money to Mr. Deegan by reason of guilty knowledge.

VIII

Weinstein Told Deegan to Smash His Car; Feign and Exaggerate Injuries; Recommended Doctors Who Would Be More Favorable on Injuries; Told Deegan Not to Go Back to Work After His Accident.

1. *Weinstein Told Deegan to Smash Up His Car*:

Leland Deegan testified as follows:

That shortly after the collision he met Weinstein at Providence Hospital; Weinstein saw Deegan's car, noted that it had no damage and told Deegan to bash it into a tree, which he did (II, 257, 258).

That the day after smashing up the car, Deegan talked to Weinstein and told Weinstein what he had done. Weinstein said to get rid of the car (II, 264).

That Deegan then immediately sold the car back to George Barnard (II, 263).

That at the time Weinstein told Deegan to get rid of the car, Weinstein was holding a photograph of the rear-end of the Deegan car which he showed to Deegan. It showed no damage to the Deegan car. It was Exhibit 5. Weinstein told Deegan he had bought Exhibit 5 from a photographer (II, 265, 266).

That at the time Deegan met Weinstein at Providence Hospital, the meeting first took place in Saunders' hospital room. Norman Fields was there as a patient in the same room (II, 255).

That is the end of Deegan's testimony on that point.

Initially, at this point, it should be observed that a jury could have as reasonably inferred from this narrative that Weinstein was trying to build up damages in a legitimate accident as to infer that Weinstein had guilty knowledge of a staged collision.

However, the following shows that Deegan's testimony is completely false:

(a) The Portland Police Department report on the Deegan collision clearly showed in two places that there was *no damage whatsoever to the Deegan's car* (Ex. 402; I, 174, 175). Anyone can buy or see a police report (I, 172; XXVII, 5218). Expert witnesses testified that a police report was almost invariably obtained and used by an attorney handling a personal injury case (XXIV, 4637; XXV, 4914; XXVII, 5218).

It is inconceivable that Weinstein, an experienced personal injury attorney, would direct Deegan to smash up the car when the police report showed there was no damage to the car!

(b) Al Allaway, a professional photographer of collisions in the Portland area, had a man on the scene that night who took flash pictures of the Deegan-Howerton cars (Exs. 4, 5, 403, 404). The police officer received the call at 11:14 p.m. (I, 156), and arrived at the collision scene at 11:18 p.m. (I, 157). Allaway's photographer arrived and took the pictures at 11:23 p.m. (I, 196; XXI, 4143).

Allaway found out about collisions by monitoring

police calls. In 1958, Allaway photographed about 55% of the collisions in Multnomah County (Portland area) (XXI, 4140, 4141). In 1958, Weinstein bought about 5% of the pictures ordered by all attorneys in the Portland area (XXI, 4141). Allaway sold to attorneys, insurance companies or any interested party (XXI, 4143).

The Deegan collision was September 11, 1958. Weinstein ordered the pictures September 22, 1958 (XXI, 4144, 4160). Allaway mailed the pictures to Weinstein on the 25th of September, 1958 (XXI, 4144, 4160). Exhibit 465 is a copy of the sales slip taken from Allaway's files showing mailing date. The earliest they could have arrived would have been September 26, 1958, although probably later than that (XXI, 4145; Ex. 465).

Consequently, *Weinstein could not have had the pictures until over two weeks after the collision.* It will be recalled that Deegan said that he saw the pictures *the day after* Weinstein told him to smash up the car, which was the day after the accident.

Here again, it is inconceivable that Weinstein, knowing that a great percentage of the vehicles involved in collisions were professionally photographed specifically for the purpose of showing what damage occurred, would direct Deegan to inflict damage to his car.

(c) Exhibit 502, a certified copy of a record of the Director of Motor Vehicles, shows that the Deegan car was not sold until November 21, 1958, and that it was sold to Edith Thomas (Boisjolie)—not to George Barnard two days after September 11, 1958, as Deegan testified he did on Weinstein's direction.

Taking the most favorable view of the testimony from the government's standpoint,, a jury could as reasonably conclude innocence as it could conclude guilty knowldege.

2. *Weinstein Recommended Doctors and Told Clients How to Fool Doctors*:

The Deegans testified that sometime after their collision, (Count VI), Weinstein expressed dissatisfaction with the medical reports of Dr. Joe Davis—told them to see Dr. Gregg Wood, and they would get better reports (II, 271; III, 436).

The Deegans went to Dr. Wood. Actually *a comparison of the reports of Dr. Wood* (Exs. 466, 468) *shows they are less favorable from a plaintiff's standpoint than the reports of Dr. Davis* (Exs. 467, 469).—Both doctors found muscle spasm, which is an objective finding (XXII, 4232, 4250, 4387).

The Deegans also testified that Weinstein told them to exaggerate their injuries when being examined by Dr. Wood; that on examination they should not wince in the event they were stuck with pins, and in bending they should not go the full distance, etc. (II, 295; IV, 617). Mrs. Deegan said she did restrict her movements to fool Dr. Wood, and thinks she fooled him (IV, 702-704).

Strangely enough, the reports and testimony of Dr. Davis (Exs. 467, 469; XXII, 4387, 4397, 4400) show that there *was* limitation of motion. *But Dr. Wood's reports* (Exs. 466, 468) *show no limitation of motion, except in one minor respect.* Dr. Wood testified that the Deegans' ability to bend and move was normal (XXII, 4230, 4248, 4250).

Obviously, all this adds up to nothing for the government. Assuming, however, that what the Deegans said is all true (as we must), a reasonable jury could reasonably infer that Weinstein was merely attempting to build up the damages in a legitimate accident. Certainly, a reasonable jury could as reasonably infer innocence as to infer guilty knowledge.

3. *Weinstein Told Deegan Not to Work*:

Mrs. Deegan testified Weinstein told her and Mr. Deegan to lay off work after the collision (Count VI) (IV, 615). Actually, Mrs. Deegan lost only one day of work (IV, 714).

As for Mr. Deegan, although Mrs. Deegan claimed he had worked for Georgia Pacific for about two weeks prior to the collision (IV, 747), he only worked three days (Ex. 486; XXIV, 4694, 4695, 4700). Prior to Georgia Pacific he had not worked at all (IV, 747). Exhibit 486 is the only withholding slip he had for all of 1958; his entire earnings for the year were $41.61 (XXIV, 4700, 4701). His collision did not occur until September 11, 1958. Apparently Deegan did not take much urging!

Here again, assuming the full truth of what the Deegans said, it is just as reasonable that Weinstein was attempting to build up damages as it is to conclude he had guilty knowledge.

IX

Weinstein Had No Difficulty in Finding Giegerich for Service by Mail

Weinstein brought action against defendant Giegerich and Wolfard Motor Co. for Allison, John Barnard and Page (Counts VII and VIII). It was necessary for Weinstein to serve the Director of Motor Vehicles under an Oregon statute as Giegerich was not in Oregon. Weinstein was required by statute to mail copies of summons and complaint to Giegerich. This Weinstein did at Giegerich's home address in California (XXVI, 5113, 5128).

The government has argued that inasmuch as Weinstein mailed such to Giegerich's address in California this had a sinister meaning.

Weinstein tried to serve Giegerich in Portland and received a "not found" return from the sheriff. He then called Mr. James Minor, the claim's manager for Fireman's Fund Insurance Company (the company that had the coverage and with whom Weinstein had negotiated for settlement), and asked him for Giegerich's address. Minor furnished it to him (XXVI, 5113, 5114).

Minor was one of the chief witnesses for the government (XIII, 2553, et seq.). If Weinstein's testimony had not been true, Minor undoubtedly would have been recalled by the government to so state, which he was not.

X

Weinstein's Remark to Rose Concerning the Collision

Conspirator Rose testified that one time when he was in Weinstein's office, Weinstein told him there was some talk about the accident being fixed (Counts IV and V), and asked Rose about it. Rose testified he agreed with Weinstein that no one would risk their neck for a little money (IX, 1769).

On cross-examination Rose testified:

> "Q. As I understand it, at some later time, some later trip that you made down to Mr. Weinstein's office, that he made some remark to you about how both of you figured or he figured or you figured that no one would be crazy enough to risk their necks for a little money or something to that effect?
> A. That is correct.
> Q. Did you agree with that?
> A. Yes.
> Q. I take it by that that you never indicated to him that there was ever anything phoney about this accident?
> A. No, sir; I did not." (X, 1844)

A reasonable jury could have reasonably inferred from this testimony that Weinstein had somehow heard some rumor and was checking up. This is a reasonable inference—as reasonable as would be the inference that the question resulted from guilty knowledge on the part of Weinstein.

There should be nothing surprising in connection with this episode. James Buell, attorney for the insurance company, who defended the cases for Swertfeger (VIII, 1505),

himself interrogated his own client Swertfeger under oath concerning the facts of the accident (VIII, 1454; Ex. 34-A). This is an unusual procedure. Thereafter, Buell and the insurance company settled the actions and claims against Swertfeger and defended him in court (VIII, 1507; IX, 1601).

XI

Weinstein Simulated Saunders' Signature, and Witnessed the Same; the Power of Attorney

Saunders was a passenger in the Deegan car at the time of the collision (Count VI). Thereafter, Saunders desired to leave Portland for an indefinite period. He gave a general power of attorney to his attorney, Weinstein, so the case which Weinstein had filed for him could be settled (Ex. 488).

When the cases of the Deegans and Saunders were settled with the insurance company about March 1, 1960, Saunders was gone. Weinstein attempted to locate Saunders for about two weeks. About March 16, 1960, Weinstein endorsed the draft for $2,250, signing the name of Saunders; he also executed the release by signing Saunders' name. He witnessed the signature of Saunders on the release. He also personally endorsed the draft, inasmuch as it was made out to Saunders and to Weinstein as Saunders' attorney (Exs. 18, 19). This was all done pursuant to the power of attorney. Weinstein signed the draft as nearly as he could as Saunders would have signed it.

The proceeds of the $2,250 settlement were used to pay the doctors, the hospital, the loan of about $1,100

from Weinstein, court costs, and attorneys' fees. Saunders had very little remaining after all of the foregoing were paid (XXIV, 4709-4710, 4732-4734; XXVI, 5163-5165).

Claude McLoud, manager of the Portland claims office for the insurance company, testified that the company did not know a power of attorney was being used for the purposes of settling the case, and that the company would not have settled on the basis of a power of attorney (V. 954).

Witness Perrin, the adjuster on the case, in his November appearance as a government witness (his third), testified that he did not know that Weinstein was signing the draft and the release for Saunders—that he did not know there was a power of attorney (XXIX, 5628). This testimony was given on rebuttal.

There was no claim that it was not a valid power of attorney.

The government made much concerning this matter. Nevertheless, the law is very clear that an attorney-in-fact, pursuant to a power of attorney, is fully authorized to execute a negotiable instrument by signing the name of the principal. He need not indicate in any way that he is signing pursuant to a power of attorney, rather than that it is being signed by the principal; the fact that he simulates the signature of the principal is of no consequence: *Kiekhoefer v. United States National Bank of Los Angeles,* 2 Cal. 2d 98, 39 P.2d 807; *Flat Top National Bank v. Parsons,* 90 W.Va. 51, 110 S.E. 491, 495; O.R.S. 71.019; 96 A.L.R. 1251; *Independence Indemnity Co. v. Grants*

Pass and Josephine Bank (CA 9), 29 F.2d 83; *Elliott v. Mutual Life Insurance Co.*, 185 Okla. 289, 91 P.2d, 746.

Thus, no reasonable jury could have drawn any reasonable inference from the foregoing testimony other than Weinstein was acting in accordance with his authorization. The jury could not draw an inference that any of the foregoing indicated guilty knowledge on the part of Weinstein.

In the foregoing, we have attempted to set forth all of the evidence that might be construed to be in any way adverse to Weinstein. We have viewed it most favorably to the government.

At page 15, supra, we set forth the rule for determining the sufficiency of the evidence as set forth in *Cape v. United States,* (CA 9) 283 F.2d 430.

The foregoing evidence—all that could be used against Weinstein—viewed most favorably to the government—does not exclude every reasonable hypotheses other than guilt. A reasonable jury could find hypotheses inconsistent with Weinstein's guilt. In fact, innocence is *just as reasonable a hypothesis as is guilt.*

The trial judge in overruling the motion for judgment of acquittal stated that the test is set forth in *Curley v. United States,* (CA, DC), 160 F.2d 229 as follows:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play of the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of the fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." (XIX, 3700)

This test set forth by the court is true enough, but it does not state how the court is to arrive at a conclusion whether or not there is sufficient evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

Furthermore, what is said in *Curley* is not in harmony with a later case in the same jurisdiction, i.e., *Maryland & Virginia Milk Producers Ass'n v. United States* (CA, DC), 193 F.2d 907, where the court reversed Judge Alexander Holtzoff, who had relied solely on *Curley,* (90 F Supp 681, 684), stating that:

> "It is still the law that there can be no conviction of a crime on circumstantial evidence unless the only possible inference to be derived from it is that of guilt. There must be evidence which forecloses and makes impossible any other conclusion." (193 F.2d at 917 and citing among other cases, *Isbell v. United States* (CA 8), 277 F. 788).

Recently, some doubt has arisen in this court as to the true test to be applied in determining the sufficiency of the evidence. Up to then, the test has always been that set forth in *Cape,* supra.

In one of the latest cases in this court, *Sica v. United* States (CA 9), 325 F.2d, 831, in regard to the sufficiency of the evidence, the court cited *Castro v. United States* (CA 9), 323 F.2d, 683, and particularly footnotes 1 and 2 at page 684. These footnotes refer to two different tests, the first being the one used in *Foster v. United States* (CA 9), 318 F.2d 684, where the rule is stated as follows:

> "The question as to the sufficiency of either direct or circumstantial evidence is whether it is substantial, taking the view most favorable to the Government."

The other test mentioned (n.2) is the test set forth in *Remmer v. United States* (CA 9); 205 F.2d, 277, which is also the test set forth in *Cape,* supra, in *Bolen v. United States* (CA 9), 303 F.2d, 870, and *Stoppelli v. United States* (CA 9), 183 F.2d 391, and other cases.

One of the cases cited in support of the so-called "substantial evidence" rule bears special mention, i.e., *Elwert v. United States,* (CA 9), 231 F.2d, 929. There the statement was made: "Here there is no question that acts of evasion were done." Nevertheless, the court stated:

> "The trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence." (231 F.2d at 933)

Elwert is typical of many of the cases where the matter of the sufficiency of the evidence is assigned as error. Obviously, in *Elwert,* there was direct evidence of evasion. This is also true of many of the cases where the test is discussed. They are not, in fact, circumstantial evidence cases. An analysis of their facts shows that there was direct evidence of guilt. Therefore, it was not necessary to decide what the test should be.

Thus, there are what might appear to be two different rules for testing the sufficiency of the evidence in a criminal case.

The same dilemma faced the court in *Cuthbert v. United States,* (CA 5), 278 F.2d 220. In that case the two appellants and Birch went from Washington, D. C. to Texas. The appellants both had records of prior narcotics

violations. Birch was a narcotic user without a record. After the three persons had been in Texas and had crossed back and forth across the border several times, Birch bought some marijuana. He was observed buying it and it was found in his possession as he was leaving to return to Washington. Birch pled guilty. All three of the persons maintained that it was solely Birch's idea to buy the marijuana and that the two appellants had no knowledge of, and did not participate in, the purchase.

After considerable hesitation, the trial court concluded that he did not believe any of the defendants. In spite of their stories he found them guilty of conspiracy and the substantive counts. Acting as a jury, the court was, of course, entitled to believe or disbelieve the testimony of the defendants and could draw any reasonable inference from the other facts.

In holding that a judgment of acquittal should have been granted, Judge Hutcheson for the Circuit Court stated (224 of 278 F.2d):

> "It is true that in one or two cases, including one from this court, *McFarland v. United States,* 273 F2d 417, 419, courts have arguendo and as dicta undertaken to give the Holland opinion an entirely different and more far reaching effect. In McFarland's case, for instance, the court stated:
>
> > 'It is not necessary that the evidence be wholly inconsistent with every conclusion except that of guilt, provided the evidence is substantial enough to establish a case from which the jury may infer guilt beyond a reasonable doubt.'
>
> "We can certainly agree that whether the evidence by which guilt is sought to be established is circumstantial or direct, *if it is substantial enough to estab-*

lish a case from which the jury may infer guilt beyond a reasonable doubt, it is sufficient to take the case to the jury. We cannot and do not agree, however, that in arriving at a decision that, as matter of law, evidence is sufficient to take the case to the jury, it is not necessary that the evidence can reasonably be found to be consistent with the conclusion of guilt and wholly inconsistent with every other reasonable conclusion. On the contrary, we are of the clear opinion that in a case where the evidence relied on to establish guilt is entirely circumstantial, it is essential to a just decision by the district judge that the evidence makes out a fact case for the decision of the jury, that the court conclude, that the jury might reasonably find not only that the evidence is consistent with a finding of guilt but that it is not consistent with any other reasonable conclusion. If this is not so, a verdict of guilty beyond a reasonable doubt, based wholly on circumstantial evidence, though it keeps the promise of a fair trial to the ear, breaks it to the hope." (Emphasis supplied by the court.)

The *Holland* case mentioned above is *Holland v. United States,* 348 U.S. 121, 140. As Judge Hutcheson points out, what was said in *Holland* as to circumstantial evidence excluding every reasonable hypothesis other than that of guilt related to the propriety of a jury instruction —not the test as to the sufficiency of the evidence to be applied by the court.

The detailed reasoning and logic of Judge Hutcheson is particularly appropriate because the facts he had before him in *Cuthbert,* supra, are almost identical with those before this court in *Doherty v. United States* (CA 9), 318 F.2d 719, also a case tried without a jury. There, too, the parties testified that the appellant did not know of the marijuana which was secreted in the car in which he

was riding. As this court stated: "The trial court was not required to accept their testimony". But, in reversing, this court observed that it was still necessary "for the Government to produce direct or circumstantial evidence of sufficient substance to warrant a finding of knowledge and participation" and that evidence which "may give rise to suspicion and speculation . . . is not enough." (318 F.2d, 719, 720.)

Support for the proposition that there is more than one rule is contained in the article of Professor Abraham S. Goldstein in 69 The Yale Law Journal, 1149, entitled, "The State and the Accused: Balance of Advantage in Criminal Procedure", and also in the note in 55 Columbia Law Review, 549, (1955) both referred to by this court in *Castro,* supra. Particular reference is made to Professor Goldstein's analysis of the rules of the sufficiency of the evidence (pp. 1152-1163). Professor Goldstein urges that the presumption of innocence and the requirement of proof beyond a reasonable doubt should be treated as something more than a jury instruction. Otherwise, as he states, there will be a risk of convicting an innocent person—exactly what Weinstein submits, happened here.

The note in 55 Columbia Law Review states that there are two rules "the substantial evidence rule" and the "circumstantial evidence rule", the latter being that set forth in *Cape, Stoppelli,* and *Remmer*. The note is careful to define what is meant by the circumstantial evidence rule, i.e., it is the classic rule taken from *Isbell* (CA 8), 227 F. 788, and repeated in substance, by this court in *Cape, Stoppelli, Remmer,* and *Bolen,* among other cases.

Nowhere, however, does the article define exactly what is meant by the "substantial evidence rule".

Turning to fundamentals, in *Isbell,* supra, the court says that the question to decide is whether or not there is "substantial evidence". The court then goes on to mention the presumption of innocence and proof beyond a reasonable doubt. It then states:

> "If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt." (227 F. at 792)

Professor Goldstein, in his Law Review article, equates the so-called "substantial evidence rule" with the so-called "rule of the Second Circuit" which is referred to and criticized in *Riggs v. United States,* (CA 5) 280 F.2d, 949, 953-955.

In this regard, we refer to the learned discourse on the entire subject of the quantum of evidence necessary in a circumstantial evidence case contained in Judge Jerome Frank's concurring opinion in *United States v. Masiello,* (CA 2), 235 F.2d, 279, 285. Judge Frank analyzes the functions of the court and the jury in a criminal case. As he states, it is necessary to distinguish between two different kinds of inferences. A testimonial inference, is one where a witness has testified to the occurrence of a fact. As he states, it rests entirely on the jury's belief in the credibility of the witness as to the occurrence of such fact. This is often referred to as "direct evidence". He differentiates this from the situation where from one or more

testimonial inferences (direct evidence), further inferences as to the occurrence of other facts may be drawn. He refers to the latter inferences as "derivative inferences" or indirect proof of facts concerning which no one has testified. As Judge Frank states, derivative inferences do not involve an evaluation of credibility.

Judge Frank further concludes that if the presumption of innocence and the requirement of proof beyond a reasonable doubt are to mean anything, then the occurrence of the derivatively-inferred facts must be much more probable than their non-occurrence.

Therefore, under the reasoning of Judge Frank, for the trial judge to have submitted this case to the jury, it would have had to be much more probable that the moneys paid by Weinstein to the guilty participants were not loans; that his representation of the staged-accidents participants was with knowledge of their false claims; and that the inference of guilty knowledge and participation was much more probable than the inference of innocence.

Judge Frank's logic is irrefutable. Even the Second Circuit itself, in two recent cases [*United States v. Lefkowitz,* (CA 2) 284 F.2d 310, 315 and *United States v. Monica,* (CA 2), 295 F.2d 400, 401], cites with approval Judge Hutcheson's opinion in the *Cuthbert* case (supra, 278 F.2d 220), indicating that even that circuit may be receding from its rule that the test of the sufficiency of the evidence in a criminal case is no different than in a civil case.

In this brief, reference has been made repeatedly to

"circumstantial evidence." This should not be taken as a criticism of circumstantial evidence or the reliability thereof, as such. In many, if not most, cases circumstantial evidence, if it points in the right direction, is as reliable as, if not more reliable than, "direct evidence."

The key question here, of course, is: Did Weinstein have knowledge that the collisions were staged?

In the case of *Ingram v. United States,* 360 U.S. 672, certain bookmakers and their full-time employees were convicted of conspiracy to evade payment of the gambling tax. Two of the full-time employees had full access to all of the facts as to whether or not the gambling tax had been paid. There was no direct evidence of the fact that these employees knew that the tax had not been paid. The government relied on circumstantial evidence to the effect that the employees were intimately connected with the operation of the lottery, they cooperated in conducting it secretly, and to their knowledge it was conducted at a profit. However, the Supreme Court reversed conviction of these two full-time employees because:

> " '* * * to establish the intent, the evidence of knowledge must be clear, not equivocal . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes.' " 360 U.S. at 680).

All evidence of knowledge was circumstantial. As stated by the court at page 678:

> "* * *. The record is completely barren of any *direct* evidence of such knowledge." (Emphasis added.)

So too with Weinstein—the record is completely barren of any direct evidence of guilty knowledge.

Another recent case which illustrates the fact that close association with guilty parties and the opportunity to obtain guilty knowledge is not sufficient to warrant a conviction is that of *Milam v. United States,* (CA 5), 322 F.2d 104. There Milam was an attorney for a corporation involved in a mail fraud operation. He formed the company, did all its legal work, was paid a retainer, traveled with its guilty officers and employees, was paid with checks fraudulently negotiated, etc. This was held to be insufficient evidence of guilty knowledge and a judgment of acquittal was ordered even though no motion had been made at the close of all of the evidence.

For a similar case in this Circuit, where there were a large number of suspicious circumstances, including association, the payment of money, etc., see *Lee v. United States,* (CA 9) 245 F.2d 322. There the court held that the evidence was insufficient.

Another recent case stating this rule for which Weinstein contends is *United States v. Saunders,* (CA 6) 325 F.2d 840, where the court states that:

> "Evidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal." (325 F.2d at 843)

However, if this court means to indicate that "substantial evidence" means no more than the "rule of the Second Circuit", and the same rules of sufficiency apply as in a civil case, then *Fegles Const. Co. v. McLaughlin Const.*

Co., (CA 9) 205 F.2d 637, would apply. There the appellants contended that the evidence was circumstantial and is "subject to the rule that if the conclusion reached from the facts in the chain of circumstances is equally consonant with the issues to be proven and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied. * * *." In regard to such assertion, this court said that "This is a correct statement of the law, not only in Montana, but in most, if not all, jurisdictions."

The same matter is illustrated by Professor Wigmore's analysis (relating to *civil* cases) as to the sufficiency of the evidence. [See Wigmore, Evidence Vol. IX, § 2494 (3rd. Ed.).] After discussing the difficulty in arriving at any fixed tests in a civil case, he summarizes the matter as follows:

> "Perhaps the best statement of the test is this: '[The proposition] cannot merely be, Is there evidence? . . . The proposition seems to me to be this: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?' "

As Wigmore states in a footnote (17) after quoting the foregoing from an English case:

> "There is also a subordinate rule, elaborated in many cases, holding that where from the same set of circumstances *either of two conclusions* may be drawn, whether the conclusions are consistent or are opposed, the case need not be submitted to the jury: * * *" (Wigmore's emphasis).

Obviously, "substantial evidence" cannot mean any less than the civil rule. As we have painstakingly shown,

in the case of Weinstein the inferences of innocence are just as strong as the inferences of guilt.

The situation of Weinstein was an unenviable one. He was thrown into a maelstrom of vague charges along with fourteen other persons, many of them his clients, or former clients, and concerning many of whom there is little doubt as to their guilt.

The Second Circuit Court of Appeals in the rather celebrated "Apalachin case" in many ways faced a like situation to that which Weinstein faced. There the Court of Appeals reversed the trial court, stating in part as follows [*United States v. Bufalino,* (CA 2) 285 F.2d 408, 417]:

> "Courts have long indulged in the somewhat naive supposition that jurors can properly assess such evidence and determine from it the individual guilt of each of many defendants, even when aided by a careful summary of the evidence such as Judge Kaufman gave here. *This makes it especially important for the trial and appellate courts to determine the sufficiency of the evidence as to each defendant in mass conspiracy trials.*"
>
> * * * * *
>
> (p 419)
>
> "But bad as many of these alleged conspirators may be, their conviction for a crime which the government could not prove, *on inferences no more valid than others equally supported by reason and experience,* and on evidence which a jury could not properly assess, cannot be permitted to stand." (Emphasis added.)

We have exhaustively set forth every bit of evidence and argument we can conceive that could possibly be used by the government to show guilt on the part of Wein-

stein. We have also used every argument that we can recall the government has ever used itself during the course of this proceeding in order to show guilt on the part of Weinstein. If there is further evidence which the government feels reflects upon the guilt of Weinstein, we assume that the government will specifically set it forth in its answering brief. We have searched the record and our recollection and can recall nothing further.

All that we have found falls far short under the rule of any Circuit, including the Second Circuit (civil case), of being sufficient evidence for the trial judge to have submitted the matter to the jury. A reading of the record indicates that the trial judge had a misconception concerning his duty and the jury's duty (XIX, 3700).

SPECIFICATION OF ERROR NO. II

The Trial Court Erred in Denying Weinstein's Motion for Separate Trial

A. The Court Abused Its Discretion in not Allowing Weinstein's Motions for a Separate Trial.

Defendant Weinstein filed a motion for separate trial February 20, 1961 (R. 14-20).

In his motion, Weinstein noted that he was named in only Counts VI, VII, VIII and IX; that by the end of the testimony the jury would be unable to distinguish between what came in concerning the first five counts and what came in concerning the others; that many of the defendants had unsavory backgrounds and criminal convictions (See Exs. 503-A-E for five convictions of fel-

low defendant Leland Deegan, as an example); that he would be branded with guilt by association; that he was a duly licensed and practicing attorney and had been for over 20 years, with a good reputation; that he would be particularly vulnerable in the minds of the jurors if staged accidents were proven on the part of any of the defendants, because the jury would rationalize *there had to be a lawyer to handle the claims and actions.*

Weinstein's motion for separate trial was denied (R. 211). On September 12, 1961, just before commencement of the trial, Weinstein again moved for a separate trial (R. 80). This motion was denied (I, 37).

At the end of the government's evidence, Weinstein again renewed his motion for separate trial (XIX, 3686). The motion was denied (XIX, 3722).

At the end of all of the evidence, Weinstein renewed his motion for a separate trial as follows:

> "The defendant Weinstein renews his motion for a separate trial on the grounds that it amply demonstrated that it is impossible for him to obtain a fair trial in a mass trial such as we have had in this case." (XXIX, 5680)

Motion denied (XXIX, 5689).

The first ground of Weinstein's motion for a new trial was that he should have been granted a separate trial (R. 105). This was denied (R. 231).

Guilt cannot, and must not, be inferred from association:

> *Evans* v. *United States,* 257 F.2d 121, 126 (CA 9)
> *Ong Way Jong* v. *United States,* 245 F.2d 392, 394 (CA 9)

Brumbelow v. *United States,* 323 F.2d 703, 705 (CA 10)

However, as pointed out by Mr. Justice Jackson in his well cited concurring opinion in *Krulewitch* v. *United States,* 336 U.S. 440, 454:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that *birds of a feather are flocked together.* * * * ." (Emphasis added.)

From the beginning, Weinstein recognized this problem. He had represented, as attorney, many of the other defendants.

Not only that, but as an attorney, he loaned money to his clients, which helped them to keep going during the pendency of their cases. The government construed these acts of kindness and prudence, which was proper and legitimate, to be something highly sinister.

The unfairness, except in rare instances, of trying any attorney with a group of disreputable people whom he has represented, appears undeniable.

The United States Supreme Court has made it clear in a series of recent decisions that every accused, however undesirable, is entitled to full representation by counsel almost from the moment he is taken into custody, and from then on, through the courts, including the appellate courts.

A large segment of the bar shudders at the very

thought of representing clients such as were Weinstein's co-defendants and former clients herein. On the other hand, there are some lawyers who are particularly adept at representing down-and-outers, the unfortunate, the unlucky, the accident prone, and the downright vicious. These lawyers are a necessity and are performing a great service. They are to be encouraged. Any such lawyer worth his salt in the representation of a client will often get into the matter so thoroughly that he will know the intimate and minute facts better than the client. This often calls for close association not only with the client, but on many occasions, with the client's cohorts.

What are we doing to the concept of full representation when the implied threat is held over these attorneys that some day they may find themselves sitting in the same dock with their clients?

On the occasion of the celebration of the golden anniversary of the Harvard Legal Aid Bureau in 1963, Mr. Justice Brennan gave the main address as reported in *Occasional Pamphlet Number Seven,* Harvard Law School, 1963. Justice Brennan urged law students not to all flock to corporate and business practices. He called on the law school to consider something in the nature of a law internship, to give students the basic experience of helping "confused and living little people." He decried the lack of able lawyers in criminal practice and emphasized the need therefor. At pages 20 and 21, Justice Brennan stated as follows:

> "For one thing, the fact that many criminal defendants may not be very nice people, people you might not like to associate with at the dinner table,

does not mean that their cases are not sometimes fascinating vehicles for the making of important law.

* * * * *

" * * * Today's leaders of the bar too seldom show that attitude; the tradition seems to have lost caste with too many of our profession. * * * I don't doubt that the relatively greater financial return in those specialties plays a large part in the choice, but if the law schools, and particularly the major ones, give only cursory attention to criminal law in the curriculum, it is hard to see how students can be blamed for coming away from law school with the feeling that perhaps the institution also shares the unfortunate tendency of the community to disapprove of lawyers who undertake the defense of people charged with crime. And the worst result of this is the consequent ignorance even on the part of very able lawyers of the extent some of the most precious values of our society are involved in the administration of criminal justice."

The explanation usually given for permitting alleged conspirators to be tried together is that if a person associates with a certain group of people, he should have no objection to being tried with them.

Where the evidence is confined to acts of representation, to try a lawyer with his client endangers the constitutional rights of both under the V, VI and XIV Amendments.

It is unfair to the lawyer and client. If the practice is allowed, the effect upon lawyers and the *clients particularly* will be devastating.

There is *no evidence* that Weinstein knew that any of the collisions were false. There is no evidence that he should have known. "Should have known" is not enough

to assess guilt. This subject is fully covered under Specification of Error No. 1(supra), "The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal."

As set forth in the appendix, the witnesses testifying against Weinstein without exception, had cogent reason for doing so. Excepting Perrin, all of the government witnesses against Weinstein were indicted defendants, conspirators, or persons fearful of what was going to happen to them next—persons who had good reason to fawn and curry favor with the prosecution. YET, NOT ONE OF THEM TESTIFIED THAT WEINSTEIN WAS ADVISED, KNEW, OR EVER INDICATED HE KNEW THAT THE ACCIDENTS WERE NOT LEGITIMATE.

It is one thing to *represent* people of such caliber in personal injury cases. It is quite another to work with them as partners.

We urge the court to recall the outstanding people who were willing, in the face of a barrage of mud and innuendo, to stand up publicly and in effect say: "I know this man. I don't believe it. It is not true". (Appendix 176-178).

Although the court would not hear most of them, 28 persons were ready to step forward. The list included community leaders of all faiths, groups and activities.

Justices of the U.S. Supreme Court and courts of appeal have been critical of mass trials. Trials similar to the one in which Weinstein found himself have bothered

the conscience of many appellate courts and judges. Some of these are discussed hereafter. The only justification for this type of trial might be the tenuous argument that if you want to consort with this type of people you should not object to being tried with them, and let the jury separate the sheep from the goats. NOT EVEN THIS SPECIOUS ARGUMENT CAN BE APPLIED HERE. Philip Weinstein is a personal injury-divorce-criminal-police court lawyer. Such a person takes his clients as he finds them. We are sure that the courts do not desire to encourage lawyers to retire from this type of practice. However, a lawyer engaged in such practice will undoubtedly have some clients who are unsavory characters, similar to the ones involved herein and with whom Weinstein suddenly found himself being tried.

Some of the general criticism of mass trials generally is stated as follows:

In *Krulewitch* v. *United States,* 336 U.S. 440, 453, Justice Jackson stated:

> "As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself."

In *Paoli* v. *United States,* 352 U.S. 232, there was a rather simple conspiracy. There was no mass trial and no multiplicity of evidentiary restrictions. A separate trial was never requested. Nevertheless, by reason of the fact that the court allowed a confession into evidence against one of the defendants which implicated one of

the others, four Justices of the United States Supreme Court felt that the defendant who was implicated by the confession did not have a fair trial. As stated at page 248:

> " * * * . After all, the prosecution could use the confession against the confessor and at the same time avoid such weighty unfairness against a defendant who cannot be charged with the declaration by *not trying all the co-conspirators in a single trial.*" (Emphasis added.)

Justice Jackson in his dissent shared by two other Justices in *Lutwak* v. *United States,* 344 U.S. 604, in emphasizing the unfairness of allowing testimony against some alleged co-conspirators and not against others, states at page 623 as follows:

> " * * * . We doubt that any member of this Court, despite our experience in sifting testimony, can carry in mind what was admitted against whom, and we are confident the jury could not."

Although guilt by association is no ground for conviction, that is exactly what caused the conviction of Weinstein. He was thrown into a mass trial with a group of disreputable and guilty people, many of whom he had represented. He was the only lawyer indicted. All inferences were immediately resolved against him. Here was the smartest one of the bunch—the only one with a college education—the mouthpiece—he must be guilty!

Attorneys must not be put in this position, or the administration of justice in the United States will suffer another grievous blow.

B. The Proof Revealed There was a Misjoinder. Therefore Weinstein was Entitled to a Separate Trial as a Matter of Law.

The following relates to an area on a motion for a separate trial by a multiple defendant where the court does *not* have discretion.

There was some evidence involving Weinstein in substantive Counts IV, V, VI, VII and VIII, involving three separate collisions. He was not charged with participation in Counts I, II or III, involving two separate collisions, nor was there any evidence of such. On the contrary, all evidence shows he did not have even a remote connection with any of those three counts.

Concerning Counts I and II, defendant Haynes testified he had never heard of Weinstein (XV, 2843). Haynes drove the car that struck the Smith car.

Defendant Smith, owner and driver of the car which was struck in Counts I and II, testified he had no dealings with Weinstein, (XVIII, 3465).

Conspirator Sanseri, a passenger in the Smith car, testified he never knew Weinstein and had no dealings with him (XV, 2907).

Edwin M. Bristol, a private investigator, witness for the government, testified as follows concerning Counts I and II:

"Q Did you investigate this entire accident?
A Yes, sir, I did.
Q And my client, Mr. Weinstein, had nothing to do whatsoever with this matter, did he?
A To the best of my knowledge his name was never

mentioned or in any way came up in my investigation." (XVII, 3352).

Concerning Count III, conspirator Anna Kimmel (Stewart), a government witness, testified she had no dealings with Weinstein and did not know him. (X, 1960). She was a passenger in the car which was struck, Count III.

Defendant Johnstone, driver of the car which struck the car in which conspirator Kimmel (Stewart) was riding, testified he did not know Weinstein (XVII, 3899).

There is no contrary evidence regarding any of Counts I, II or III.

As shown above, Weinstein renewed his motion for separate trial at the end of the government's evidence (XIX, 3686), at the end of all of the evidence (XXIX, 5680) and on motion for new trial (R. 105).

The court erred in denying the motion. The conspiracy count was of no consequence in this regard. This court makes this very clear in *Williamson* v. *United States,* (CA 9) 310 F.2d 192. At page 197, n. 16, the court states as follows:

> "Contrary to the government's assumption, factually unrelated charges against some defendants could not be joined for trial simply because all of the defendants (except one as to whom severance was granted) were jointly charged with conspiracy in Count Three of the indictment. This is true even though the charges in all counts were 'of the same or similar character,' and therefore under Rule 8(a) might have been joined in an indictment against a single defendant. Where multiple defendants are involved, Rule 8(b) requires that *each* count of the

> indictment arise out of 'the same series of acts or transactions' in which all of the defendants 'have participated.' Ward v. United States, 110 U.S.App. D.C. 136, 289 F.2d 877 (1961); Ingram v. United States, 272 F.2d 567 (4th Cir. 1959). Since in the present case the conduct upon which each of the counts is based was part of a series of factually related transactions in which all of the defendants participated.' Ward v. United States, 110 U.S.App. though the various offenses were distinct and all of the defendants were not charged in each count."

Weinstein, having no connection in the remotest form with the matters charged in Counts I, II and III, and having renewed his request for severance in a timely manner, was entitled to severance as a matter of right. Failure to grant severance was error as a matter of law.

The two cases cited by this court in the quotation above set forth in support of the opinion in the *Williamson* case are both very much in point. In *Ward* v. *United States,* (CA, DC) 289 F.2d 877, the appellant was tried and found guilty on six counts on narcotics charges. He was tried with one Lyons who was indicted jointly in Counts IV, V and VI for a sale on September 1, 1959. Lyons was not charged in Counts I, II and III which charged appellant with sale on July 31, 1959. Lyons was also charged in Count VII with sale on December 11, 1959, which was unrelated to the July 31, 1959, sale. The appellant's timely motion for severance was denied. The court reversed conviction stating:

> "But 'where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief.' " (289 F.2d at page 878)

The other case cited in the *Williamson* case was *Ingram* v. *United States,* (CA 4) 272 F.2d 567. The sole issue was whether the appellant was entitled to a new trial because of misjoinder. He was convicted on two cases consolidated for trial over his objection. In one he was indicted for events on a particular day with one group of people. In the other he was indicted for events on another day with other people.

The court in reversing conviction stated that the *discretion* to allow severance under Rule 14 only comes into play when there is a *proper joinder*. When joinder is not proper then there is no discretion. The court went on to state as follows:

> "Just as Rule 14 does not permit the Government to circumvent the prohibition of Rule 8(b), neither does the Harmless Error Rule, Rule 52(a), have this effect. The error here was no mere technicality. The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one defendant to be presented in the case against another charged with a completely disassociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. *It is not 'harmless error' to violate a fundamental procedural rule designed to prevent 'mass trials'.*" (Emphasis added.) (272 F.2d at 570).

The court pointed out that at the beginning of trial when the motion for severance was made, the district judge had nothing but the indictment and he could not foresee what the evidence would be. Consequently, to deny the motion for severance was a matter of discretion.

But after the evidence was in, and the lack of connection was apparent, the motion for new trial should have been granted as a matter of right.

Judge Browning's quoted statement as to joinder (*Williamson, supra*) has just been buttressed by another circuit. In *United States* v. *Spector*, (CA 7) 326 F.2d 345, all of the defendants had not participated in the acts and transactions alleged in each count. In granting a new trial the court adopted the reasoning of the *Ingram* case, supra, and held that severance should have been granted as a matter of right.

Nor is *Schaffer* v. *United States*, 362 U.S. 511, to the contrary. In that case the conspiracy count which linked the defendants failed of proof. However, in that case, (a) there was no motion for severance or for a new trial, and (b) both the district and circuit courts affirmatively found that under the particular facts of that case, no prejudice had been shown.

Nevertheless, four of the present members of the Supreme Court would have reversed anyway on the ground that prejudice was inherent.

SPECIFICATION OF ERROR NO. III

The Trial Court Erred in Curtailing the Cross-Examination of the Witnesses Leland and Geraldine Deegan in Connection with the Alleged Intimidation by Deegan of the Defendant Boisjolie, and Other Circumstances Involving the Last Minute Confessions of the Deegans

Defendants Leland and Geraldine Deegan, husband and wife, were indicted under Counts VI and IX (R. 1). Both pleaded not guilty. (R. 213). Both were released on $500 bail (R. 10). Both employed counsel, (III, 484). They were living in Bend, Oregon, about 200 miles from Portland, working in the same night spot. Mrs. Deegan was a waitress. Mr. Deegan played in a small orchestra in the same place. This was the situation from the time of the indictment on January 20, 1961 until less than two weeks before the trial (IV, 720). The trial was scheduled to commence September 13, 1961, which it did, (I. 14).

Labor Day was Monday, September 4, 1961. Deegans' attorney was Ray Carskadon. He and his family had gone to the beach somewhere on the Washington Coast for a week, where he could not be reached (I, 7).

On Friday, September 1, 1961, just at the beginning of the long Labor Day weekend, the special prosecutor who had just recently taken over the prosecution of the case, obtained a secret indictment against Leland Deegan for intimidating one David Leon Boisjolie on July 15, 1961, in Bend, Oregon. Bail was set at $50,000 (R. Vol II, 242-245).

Boisjolie lived in Portland (XXX, 6028). He too was a defendant in the above cause (R. 1). He had pleaded guilty some months before (R. 210) but was unsentenced (R. 231).

As a matter of fact, Boisjolie had given the government a full confession October 10, 1960. Later, he testified favorably to the government before the grand jury (Ex. 32-C Id; VI, 1186-1189; VII, 1350, 1351, 1354-1359). Inasmuch as Boijolie testified after the Deegans, this was not known at the time the Deegans testified.

Based on the intimidation of Boisjolie indictment, a warrant for Deegan's arrest was issued (R. 246). It was not turned over to a deputy marshal. Instead, it was turned over to two FBI agents who went straight to Bend and arrested Deegan that night (R. 246-A) about 9:30 (I, 6).

Deegan was immediately hustled 200 miles to Portland where he was lodged in jail. The two FBI agents who arrested him questioned him on the trip from Bend to Portland, and further after he was incarcerated (III, 525-526).

Deegan was continued on $50,000 bail for several days. Bail was then reduced to $20,000. Deegan could not begin to make either figure (III, 526; XXX, 6008).

On Thursday, September 7, 1961, Deegan signed a confession in the *mail fraud case* (Ex. 405 Id.) for the same two FBI agents who had gone to Bend to *arrest* him in the *intimidation case* (II, 369; III, 427; XXX, 6015).

The next day (Friday), September 8, 1961, Deegan entered a plea of guilty in this cause (mail fraud—conspiracy). Not until that morning did his attorney learn of the signing of the confession and of his intention to plead guilty (XXX, 6013, 6015, 6021).

Significantly, sitting right behind Deegan when he was entering his plea of guilty was one of the two FBI agents who had arrested him at Bend a week before, questioned him, and taken his confession (III, 486; XXVI, 5182; XXX, 6015; R. 246-A).

Up to this time Deegan had been held under $50,000 and $20,000 bail on the intimidation charge. His bail on the mail fraud—conspiracy charge had never been over $500. Upon pleading guilty to the *mail fraud and conspiracy charge,* Deegan's bail was immediately reduced to $2,500 on the *intimidation charge* (R. 248). Whereupon, Deegan was out on bail that day (XXVI, 5184).

Ten days later, on September 18, 1961, Leland Deegan took the stand as the chief government witness against Weinstein (II, 215).

In the meantime, with the confession of Mr. Deegan, Mrs. Deegan's followed shortly thereafter on September 12, 1961 (IV, 688; Ex. 407 Id). She followed her husband to the stand and became chief co-witness against Weinstein (III, 592).

An order was entered September 12, 1961, continuing until further order the arraignment of Leland Deegan on the intimidation charge. He was continued on bail

(R. 249). As a matter of fact, Deegan was *never arraigned on the intimidation charge*. [See entire clerk's file in the intimidation case (R. Vol. II, 242-256)].

On the day of sentencing in the mail fraud—conspiracy case (February 7, 1962), Deegan was released on his own recognizance in the intimidation case and the cash bail was refunded (R. 250, 251).

The next month (March 13, 1962), on motion of the same special prosecutor who had originally obtained it (R. Vol. II, 243), the Deegan indictment for intimidation was dismissed. The only reason given for the motion to dismiss was that it had been authorized by the attorney general on March 6, 1962 (R. 253, 254; XXX, 6036, 6037).

At the brief hearing for the dismissal of the intimidation indictment, it was explained to the court that Deegan pleaded guilty in the mail fraud—conspiracy case (XXX, 6037).

As above noted, Mr. and Mrs. Deegan were suddenly and dramatically transformed from ordinary co-defendants into Weinstein's chief accusers. Quite naturally, Weinstein was vitally interested in knowing why—*and he particularly wanted the jury to know*.

Weinstein was personally convinced that the reason for the sudden shift was that it was made obvious to Deegan that the only way Deegan was ever going to get out of jail was for him to enter a guilty plea in the mail fraud—conspiracy case and become a witness for the government. — But how could Weinstein prove this?

Get this across to the jury? *The only feasible way was from the cross-examination of the Deegans themselves.*

Weinstein was positive that if he were allowed freely and fully to cross-examine the Deegans, he could have shown that the intimidation indictment against Deegan was a sham and had no substance. Of course this was known to the Deegans. (She was present at the time of the alleged intimidation.) It was Weinstein's purpose and intention to show that the Deegans, knowing that the intimidation charge was a sham and a fraud, could see that Deegan was nevertheless locked up securely in jail under exorbitant and impossible bail. He had no chance of getting out. Thus, they reasoned, if the all-powerful government could do this to Deegan on a charge so flimsy and without substance or foundation, they knew when they were beaten, and it was time to give up.

There is no question that the testimony of the Deegans hurt Weinstein. As discussed in another portion of this brief (Specification of Error No. I), the testimony was not sufficient to take his case to the jury, but once it got to the jury it was most prejudicial.

Weinstein not only intended to show by cross-examination of the Deegans that the intimidation charge against Deegan was completely spurious and the resultant effect this had on the Deegans—but, in addition, that Mrs. Deegan was very sick; that she had two operations recently, with cancer suspected; that Deegan, being held virtually incommunicado on exorbitant bail, was ready to do anything to get out of jail. Furthermore,

Weinstein intended to show that at the very time Deegan was clapped into jail his attorney was on vacation; that Deegan did not have the benefit of legal advice until after he had determined to plead guilty to the mail fraud.

When Weinstein was cross-examining Deegan, he asked the following question:

> "Q All right. Now, on or about July 15, 1961, did this fellow Boisjolie, David Leon Boisjolie, meet you in Bend?
> A He did.
> MR. BURBANK: Objection, if your Honor Please, this is improper cross examination. We are going beyond the period of the indictment in this case, also beyond the scope of direct examination.
> THE COURT: Well, he is entitled to show interest, but I think this gets even beyond that, I sustain the objection. Do you want to make an offer of proof?
> MR. DWIGHT SCHWAB: I certainly do." (III, 487)

It is obvious that the court would not allow Weinstein to question Deegan in any way concerning the events of the alleged intimidation (III, 488-491).

Thereafter, Weinstein made the following offer of proof concerning the events of the alleged intimidation, July 15, 1961:

> "MR. DWIGHT SCHWAB: I offer to prove by this witness that on or about the 15th of July, 1961, that he was playing in this tavern where he played in this little orchestra; he plays the banjo; where his wife is also a waitress. That during the course of the evening he noticed the defendant, David Leon Boisjolie, sitting there, and they got into a conversation; that Boisjolie wanted to talk to him and so Deegan said, "Well, wait until the next intermis-

sion." At the next intermission both Deegan and Boisjolie went outside, and Deegan asked Boisjolie what he was doing in Bend, and Boisjolie said, "I am just up here to have a little fun," and I think he said "whore around." And Deegan told him that that was a poor place to do that, and Boisjolie then asked him what he was going to do in this case. And Deegan told him that he was going ahead just as he already was, and he said, "Why?" and Boisjolie said, "Well, I have entered a plea of guilty," and Deegan had not heard this before and Deegan told him that he was going to continue on the same as he had before and continue on with his not guilty plea. That this was substantially all of the conversation that took place at that time, and that they then went back into the tavern and Boisjolie hung around for a while and then left and then at no time was there even a suggestion, any suggestion that Boisjolie had been intimidated in any way.

Now, that is substantially my offer of proof. That is my offer of proof as to what happened, substantially, as well as I can find out on the night of July 15, which is supposedly the basis of this indictment for intimidating the witness." (III, 533, 534)

(At no time would the court allow a question-and-answer offer of proof—III, 491, 496, 503.)

The court ruled as follows:

"THE COURT: All right, I will sustain the Government's objection to the offer of proof, first, on the ground that the attorney for the witness has invoked the Fifth Amendment. Second, on the ground that at this stage of the game of the case, I view this offer of proof as dealing with a matter that is immaterial and an effort to impeach and not properly a matter of impeachment. So, the offer of proof is denied." (III, 535)

When Mrs. Deegan was testifying, Weinstein made the following offer of proof concerning the events of the alleged intimidation of Boisjolie by Deegan, July 15, 1961:

"Are we ready, gentlemen? Do you have an offer, Mr. Schwab?

MR. DWIGHT SCHWAB: Your Honor, at this time the defendant Weinstein states that had he been allowed to cross examine the witness Geraldine Deegan, that Mrs. Deegan, to the best of his knowledge and belief, would have testified as follows, had the Court allowed her to answer questions concerning the arrest and detention of her husband, Leland Deegan, and the events leading thereto. Each of the following paragraphs is a separate offer of proof:

1. Mrs. Deegan was working the night of July 15, 1961, at the Tavern in Bend, Oregon, on her regular job, and her husband was playing in the orchestra that was playing in the same tavern.

2. The defendant, David Leon Boisjolie, came into the tavern during the course of the night of July 15, 1961.

3. That the defendant, Leland Deegan, in no way intimidated the defendant Boisjolie.

4. That after the alleged intimidation occurred, that the defendant Boisjolie remained in the tavern for some little time with several girls of local poor repute.

5. The arrest of Leland Deegan for intimidating Boisjolie and his subsequent treatment until he confessed was solely for the purpose of breaking Deegan down and obtaining evidence against Philip Weinstein.

6. Defendant Leland Deegan was arrested in Bend, Oregon, by the FBI the night of Friday, September 1, 1961." (IV, 738, 739)

* * * * *

"Defendant Weinstein offers to prove the same by the examination of Leland Deegan.

It was my purpose to show by evidence of this witness, Geraldine Deegan, and her husband, that the Government deliberately arranged this entire matter on the eve of trial for the purpose of breaking down the Deegans and getting their testimony. Were I allowed to fully and completely cross examine this witness and her husband, I could show what a transparent charge was brought against Leland Deegan on the intimidation of Boisjolie, and how he was scared, coerced and browbeaten into testifying for the Government, and thereby his wife also. It is vital that the jury know this. The testimony of these two have hurt my client. The Deegans are merely pawns being moved about in an attempt to get them to testify concerning my client. The Government never seriously considered the intimidations charge, does not now and never intends to prosecute the same. It was merely a means to attempt to get evidence against my client.

THE COURT: I must remind counsel that we are trying this case on the indictment, nine counts, against the defendants named, and we are not trying any other case at this time in this court. We are trying the one case. Counsel is seeking to bring in entirely different, extraneous matters and try the witnesses rather than the clients, and the offer of proof is denied, and I must caution you not to ask questions which have been the subject of an offer of proof and which has been rejected, because the ruling has been made, the legal determination has been accomplished, and any attempt on the part of counsel to put that matter before the jury is, I am sure, a matter that the Oregon Bar Association has spoken upon in the book involved that counsel has just read from.

MR. DWIGHT SCHWAB: Your Honor, I felt, I think you were here speaking of my cross examination of Mrs. Deegan and after we had discussed some matters concerning Mr. Deegan, I felt now, if the Court will recall, I don't want to take up any time, if the Court will recall that Mr. Carskadon

was even brought up here to consult with Mr. Deegan concerning his rights under the Fifth Amendment, and the Court was concerned about that. I felt that it was an entirely different situation with Mrs. Deegan and because she was not under indictment on this other charge, but she had considerable knowledge concerning it, but the problem of the Fifth Amendment was in no way involved. She was a witness, he was a principal in that other case, and I felt that the circumstances were somewhat different, and I can only make my record by asking the questions.

THE COURT: No, you can't. No, counsel, you have made your record by your offer of proof. I refuse to permit you to ask questions to the jury which have already been ruled out and I will not permit it.

Now, are we ready to proceed?" (IV, 740-742)

It should be noted that Weinstein was not alone in his feeling that the Deegan intimidation charge did not ring true; that on the very face of the situation there was an aura of suspicious circumstances. The judge who took Deegan's plea of guilty herein to mail fraud had the following to say during the course of that proceeding concerning the intimidation charge:

"If this is not a proper charge, I think it should be dropped against him [the intimidation charge]. If it is a proper charge, I think that the government should go ahead and prosecute him. I can tell you that I would have been less enamoured of the case had I known from the start that the witness who was alleged to have been intimidated went from Portland, Oregon, to Bend, Oregon, where he was intimidated. Now, it may very well be that he was still intimidated, but that puts a different picture on it." (XXX, 6028).

At the same proceeding, even Deegan's own attorney, Ray Carskadon, when the court asked him concerning acceptance of the guilty plea, informed the court as follows:

> "Well, just as I have informed the Court, I still think that some government agency, I don't know who, more or less brought this man in under the intimidation of a witness section, placed bail at $50,000, which I think is exorbitant. The Court reduced it to twenty thousand, which I think is still exorbitant. From the facts, the way I have learned them, I believe it is not a proper thing.
>
> "I have been, as the Court realizes, in the prosecution end as well as in the defense end, and I think that in itself was intimidation. This man's wife has been operated on twice, a throat ailment. She is home back in Bend now. I know that has been worrying him, and the idea of not getting reasonable bail has been worrying him. I don't know whether it is that that has caused this or what, but I talked to the man yesterday. At that time he informed me that he was innocent and wanted to go to trial. This morning, unknown to me, this has come up."
>
> "* * * . He didn't talk to me before he talked to the F.B.I. and made this statement. He didn't talk to me about changing his plea in any way so I am just caught cold on the thing, and I know nothing about the circumstances." (XXX, 6020, 6021)

It was clear error to refuse to allow cross-examination on the charge against Mr. Deegan for intimidation of Boisjolie which precipitated their abject confessions and capitulation as government witnesses.

In addition to the transparent intimidation charge which Weinstein was prepared to explode, the court

improperly curtailed the cross-examination of these two harmful witnesses in other ways.

Weinstein offered to prove:

"'On the night of September 7, 1961, Mr. Sherk and Mr. Householder, two FBI agents, again went out to Rocky Butte jail and spent close to three hours with Mr. Deegan in one of the rooms out there.'

MR. BURBANK: Right there, your Honor.

THE COURT: Sustain the objection.

[The offer of proof continued:]

* * * 'And gave Mr. Deegan to understand by just the way they talked to him that if he wanted to get out of jail it was necessary for him to cooperate in this case, the case that is now being tried. They didn't say that in so many words, but by the questioning that was given at that time he got that distinct impression.'

MR. BURBANK: Right there.

THE COURT: Sustain the objection." (III, 513).

In a further effort to show the pressures leading up to the capitulation of the Deegans, the following series of questions were asked of Mrs. Deegan:

"Q All right. Now, Mrs. Deegan, do you recall that your husband was arrested on the 1st day of September, 1961, in Bend?

A Yes.

Q Were you present at the time he was arrested?

A Yes, I was.

Q Did you see him on the occasion of his arrest?

Mr. BURBANK: Objection, if your Honor please, this gets into the same matter which we were on yesterday. [This reference is to Mr. Deegan's cross-examination.]

THE COURT: Sustained as not proper cross examination.

MR. DWIGHT SCHWAB: (Q) Where did the

arrest take place, Mrs. Deegan?

MR. BURBANK: Objection, if your Honor please.

THE COURT: Sustained.

MR. DWIGHT SCHWAB: (Q) After your husband was arrested, Mrs, Deegan, was he taken out of Bend immediately?

MR. BURBANK: Objection, your Honor please.

THE COURT: Sustained.

MR. DWIGHT SCHWAB: (Q) After your husband was arrested, Mrs. Deegan, when did you next see him?

MR. BURBANK: Objection, if your Honor please, that is immaterial, that is improper cross examination of this witness.

THE COURT: Sustained.

MR. DWIGHT SCHWAB: (Q) When did you next see your husband, Mrs. Deegan?

MR. BURBANK: Objection on the same grounds, your Honor, I think this calls for an offer of proof.

THE COURT: I will ask counsel to refrain from asking the questions, the offer of proof on the subject has been already rejected as a part of another witness. You can show interest or bias but this line of testimony is not proper.

MR. DWIGHT SCHWAB: May I have an exception, also, your Honor.

THE COURT: This line of testimony shows nothing of the kind, counsel.

* * * * *

Q At the time that your husband was arrested and on $20,000 bail and $50,000 bail, what was the state of your health?

MR. BURBANK: Objection, if your Honor please.

THE COURT: Sustained.

* * * * *

Q Did he lead you to believe that he could get out on bail if he would get $250?

A Yes.

Q And state whether or not you had trouble raising the $250?

MR. BURBANK: Objection.

THE COURT: Sustained, counsel, the only matters you are entitled to inquire into, I have advised you, are matters that have to do with interest of something that would affect the credibility of this witness. Now, you are getting far afield and I must caution you.

MR. DWIGHT SCHWAB: Well, your Honor, it is hard to segregate it.

THE COURT: No, counsel, you are very capable and able to do so.

MR. DWIGHT SCHWAB: Thank you.

(Q) Did you raise the $250?

MR. BURBANK: Objection, if your Honor please.

THE COURT: Sustained.

MR. DWIGHT SCHWAB: (Q) Did you see your husband that night or did you talk to him at a later time?

MR. BURBANK: May I have the question, please?

THE COURT: Would you read it, please?

(Last question read.)

MR. BURBANK: Objection unless there is proof.

THE COURT: Sustained. Counsel, you are inquiring into matters that have no connection with this action at all and are not proper cross examination and are not within the field on which I permitted you to inquire." (IV, 720-725)

Thereafter, Weinstein offered to prove through Mrs. Deegan the following matters:

"7. The arrest of Leland Deegan occurred at a tavern where Deegan played in a small dance orchestra and where his wife was a cocktail waitress.

8. The arrest occurred on the bandstand while the orchestra was playing a number.

9. Deegan was almost immediately taken out of the band by the FBI to Portland.

10. He was barely allowed to say "goodbye" to his wife.

11. The witness Geraldine Deegan was sickly, having recently had several operations.

12. She could not see him or communicate with her husband, despite every effort to do so. He was held incommunicado.

13. She tried to communicate with Attorney Ray Carskadon, attorney for both Deegans in connection with this case, but found he had been on vacation for some while on the Washington coast, and was then on vacation.

14. Deegan never had a chance to talk to his attorney before his confession was taken.

15. Mrs. Deegan saw Deegan in court when his bail was reduced from $50,000 to $20,000.

16. Deegan was desperately upset. He was ready to do anything to get out of jail.

17. The primary interest of both Deegans was to get him out of jail.

18. Twenty thousand dollars bail was far beyond the reach of the Deegans.

19. Leland Deegan contacted Geraldine Deegan the afternoon of September 8, 1961, after he had pled guilty. He told her to raise $250 and he could get out on bail.

20. Mrs. Deegan had an extremely difficult time, but by going to a number of people over a period of several hours, she was finally able to raise $250, which was wired to Portland.

21. Deegan was out on bail that evening.

Defendant Weinstein offers to prove the same by the examination of Leland Deegan." (IV, 739, 740)

The entire offer was rejected. (See supra 96, 97; IV, 741, 742).

Through Leland Deegan, Weinstein offered to prove that Deegan's wife was sick at the time of his arrest as follows:

"* * * . That he was immediately brought to Portland and lodged in Rocky Butte jail. That he was questioned by the FBI and he had a sick wife.

MR. BURBANK: I am going to object to that part, your Honor.

THE COURT: I don't think that is proper." (III, 519)

A number of times Weinstein tried to prove that Deegan did not have an opportunity to consult with his attorney and that this was all a part of the situation with which the government faced Deegan. Weinstein offered to prove:

"MR. DWIGHT SCHWAB: All right, perhaps the court can rule as we go along. That he did not have the opportunity to consult with his attorney who was on vacation at the time.

THE COURT: That is not proper.

MR. DWIGHT SCHWAB: You are ruling all that out?

THE COURT: Yes." (III, 519)

At another point Weinstein again offered to prove:

" 'Mr. Deegan still had not talked to his attorney.'

MR. BURBANK: Just a moment to that point, your Honor.

THE COURT: Sustain the objection." (III. 508)

Whenever Weinstein attempted to examine either of the Deegans on any phase of bias, his attempts were severely hedged and restricted, as a reading of that phase of the cross-examinations will show (III, 484-537; IV, 720-742).

The situation is reminiscent of *United States v. Standard Oil Co.,* (CA 7) 316 F.2d 884, 891, where:

> "* * * the court 'protectively erected barrier after barrier to the effective cross-examination of Rice.' "

It was most important to show all the circumstances of Deegan's arrest; how he was swooped upon as he was playing his banjo in the tavern where he and his wife were working, right in the middle of a number; how he was whisked out of town immediately by the two FBI agents and hardly allowed to say good-bye to his wife; all adding to the awe and hopelessness of two scared people.

It was important to show that Deegan was held incommunicado—further adding to the mounting fear—that his attorney was vacationing on the Washington coast and could not be reached, although Mrs. Deegan attempted to reach him.

It was important to show the coercive force of impact that the $50,000 and the $20,000 bail figures had on the Deegans by the testimony of Mrs. Deegan that she had great difficulty in raising a measly $250 cash for the bail bondsman at the time bail was reduced immediately after Deegan's guilty plea herein.

The enormity and pressure of the intimidation indictment is apparent from the mere mathematics of the bail. Deegan had been out on $500 bail on the mail fraud charge. Along comes the spurious intimidation indictment and he is put under bail 100 times greater, later reduced to 40 times greater.

Of course, of primary importance was a full showing as to the spurious nature of the intimidation charge thrown at Deegan, thus completing the utterly hopeless picture.

It cannot be said by any means that full inquiry of the Deegans on the question of bias would have been fruitless. It should not be overlooked that Weinstein's counsel had talked to the Deegans after Mr. Deegan had confessed (III, 472; IV, 709), and to the extent that he was allowed to do so, had developed significant evidence favorable to Weinstein, such as:

1. Weinstein had never given any indication to the Deegans that he had any notion that the collision (Count VI) was spurious, (III, 463, 464, 472, 473; IV, 709, 710, 718).

2. The Deegans affirmatively testified that they had never ever indicated to Weinstein that the collision had in fact been set up. (III, 480; IV, 689).

3. The Deegans positively testified that all sums of money paid to them by Weinstein had been by way of subsistence loans while their case was pending (III, 465-472).

4. The Deegans positively testified that all sums

that had previously been paid to them by Weinstein were deducted from their share upon the final settlement of the case (III, 465-472).

Most assuredly, verbal threats and promises are by no means the only—or even the most effective—method of persuasion or suggestion under many circumstances.

Weinstein was hardly allowed to commence any exploitation of the entire subject of real bias. The basis for the rulings was that the matter was collateral—that this was an attempt to go into the facts of other cases:

> "THE COURT: I must remind counsel that we are trying this case on the indictment, nine counts, against the defendants named, and we are not trying any other case at this time in this court. We are trying the one case. Counsel is seeking to bring in entirely different, extraneous matters and try the witnesses rather than the clients, and the offer of proof is denied, and I must caution you * * *." (IV, 741)

To apply such restrictions is reversible error. An important case is *United States v. Masino,* (CA 2) 275 F.2d 129. In this case there were two principal government witnesses, Brown and Beville.

As to Brown, defendants offered to show he had been arrested on the charge of possessing narcotic gear and that the proceedings against Brown had been dismissed at the urging of a federal prosecutor. The trial court curtailed the cross-examination of Brown and excluded the proffered evidence regarding the charge against Brown and the disposition of that charge by the other court. The defendants also tried to go into the merits

of the matter—that is, whether Brown did nor did not have possession of the gear. This was also denied by the court.

In holding that this was reversible error, the Court of Appeals said (275 F.2d at 132).

> "It was highly relevant and material to bring out that the state court charge for possessing such instruments for the administering of narcotics had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government. This is the kind of situation where the widest possible cross examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. It was substantial error for the trial judge to restrict this line of cross-examination."

As to the other prosecution witness, Beville, the government on direct examination brought out about what the court allowed Weinstein to prove in this case, i.e., Beville had been indicted for his participation in the transaction involving Masino, that he pleaded guilty and was on probation. The record also showed that there were two other counts relating to a sale of narcotics on a previous occasion (not related to Masino) and these were dismissed. The defense unsuccessfully sought to develop whether Beville had been indicted for the previous sales, *the facts concerning the sales,* etc.

Thus, they were seeking to "try a collateral matter", "try another lawsuit" or "bring in collateral matters,"

the purported basis for the restriction on cross-examination of the Deegans.

This was also held to be reversible error (275 F.2d at 132-133):

> "All the facts regarding the indictment against him [Beville] and the disposition of the other two counts were pertinent so that the jury could pass judgment on Beville's motives and their effect on the truthfulness of his testimony."

The court then added:

> * * * "The indictment and its disposition was a matter so intimately related to Beville's possible motives to falsify and his relationship to the government which had called him as its witness that the trial court should have allowed full exploration of these matters on cross-examination."

In reversing the case, the Court of Appeals summarized the applicable rules as follows:

> "Indeed, where the principal witnesses appearing in behalf of the prosecution have a criminal record or have engaged in illegal practices and are accomplices to the crime charged, it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit."

In *United States v. Hogan,* (CA 3) 232 F.2d 905, the trial court instructed the jury that two accomplices, whom the defendant wanted to cross-examine in regard to their having pled guilty before another judge, had not been sentenced and that their testimony should be viewed with caution. However, he would not allow the defense to go into the details.

In other words, the court itself instructed the jury

approximately to the extent that Weinstein was allowed to cross-examine the Deegans.

In reversing the trial court, the Court of Appeals said (232 F.2d 907):

> "But this instruction to the jury was not an adequate substitute for active cross-examination. The importance of cross-examination here is that it enables the jury to determine what effect, if any, the postponing of sentence and the release of recognizance had upon the minds and conduct of the witnesses (citing authority). Merely informing the jury that the witnesses were yet to be sentenced does not bare for the jury's appraisal the extent to which the witnesses may have been motivated by expectations of leniency."

The Hogan case is cited with approval in *Thurman v. United States,* (CA 9) 316 F.2d 205, 206. Limiting full cross-examination of a co-conspirator who has pleaded guilty and become the principal government witness is error.

In *Spaeth v. United States,* (CA 6) 232 F.2d 776, 62 A.L.R.2d 606, Mr. Justice Stewart sat as a circuit judge. This case also explodes the idea that because some other case is involved, one cannot delve into the matter on cross-examination. The defendant was being tried for perjury. The chief government witness was a bank robber. The defense wanted to cross examine on all the details concerning the bank robber's conviction in another cause. This was not allowed.

The Court of Appeals reversed on the ground that there should have been careful scrutiny of the bank

robber's motive for testifying, and the defense should have been allowed to go into the matter completely.

The other cases similar to the case at bar are:

Sandroff v. *United States,* (CA 6) 158 F.2d 623.
Farkas v. *United States,* (CA 6) 2 F.2d 644.

In both cases the defense attempted to develop fully facts and circumstances of another case where the prosecution witness had been arrested. The court held that such should be allowed.

See also, *United States v. Lester,* (CA 2) 248 F.2d 329.

Based almost wholly on two of the above cases *(United States* v. *Lester,* and *United States* v. *Masino),* Wigmore had added a new paragraph to his work on Evidence, Volume III, §967, 1962 Pocket Supplement, page 186:

> "Apart from accomplices and co-indictees, a witness in a criminal case, as well as in a civil case, may have a motive to testify falsely about a particular matter. No useful purpose would be served in undertaking to enumerate even some of the innumerable motives that may exist. Suffice it to say that evidence of such motive is to be distinguished from that which merely tends to discredit the witness generally."

SPECIFICATION OF ERROR NO. IV

The Trial Court Erred in Denying Weinstein's Motion for Access To Certain Documents. (Jencks Act)

A. Katherine Hart:

Katherine Hart was called as a government witness. She testified she went to Weinstein's office early on an October 1958 morning with George Barnard. She said she was asked to leave the room. Shortly after, she and Barnard left the office and Barnard went to the bank and got some money (XVIII, 3491).

She identified Weinstein in the courtroom (XVIII, 3489). This, in spite of the fact that a year previous she testified at another proceeding that she would not be able to recognize Weinstein (XVIII, 3565), and she has never seen him since the alleged October 1958 visit (XVIII, 3572).

1. Cross-examination developed that Katherine Hart had been in contact with government agents on at least four different occasions, at which times statements were made or notes were taken by the agents. The first occasion of her contact was when she *voluntarily* went to the FBI not over three weeks after the above alleged incident (XIX, 3607, 3608). She said she made the office visit after October 17 (XVIII, 3571); the FBI visit was no later than November 6, 1958 (XIX, 3650).

On cross-examination she was asked as follows:

"Q *When did you first talk to any police officer*

about any of this that you have been telling us about here today?

A Any? Does that mean federal or state policemen?

Q Just any of them.

A The first time I talked to anybody about it was in February of 1958.

Q In February of 1958?

A Yes, or excuse me, November.

Q *November of* 1958?

A *Yes.*

Q And who did you talk to?

A I talked to two F.B.I. agents.

Q Where?

A In this building.

Q And did you give them a statement at that time?

A Yes, I did."

* * *

"Q And a statement was taken?

A Yes." (XVIII, 3591.)

At this point Weinstein's counsel asked for the statement (XVIII, 3593).

Government counsel volunteered that the statement given by Katherine Hart was not on the subject matter of her testimony (XIX, 3610). The court in denying the request said the same thing and, further, that it was not a verbatim statement (XIX, 3650). Yet the question asked the Hart woman which brought this statement to light was as to *when she first talked to the police about the matter she had just testified to.* It is marked court Exhibit "K" (XIX, 3651).

This interview of Katherine Hart with the FBI within three weeks after her alleged visit to Weinstein's office

was important. If she made no mention whatsoever to the FBI of her alleged visit to Weinstein's office this would have been effective in discrediting her story. This was pointed out to the court (XVIII, 3559).

> "The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."
>
> *Jencks* v. *United States,* 353 U.S. 657, 667;
> *Campbell* v. *United States,* 373 U.S. 487.
> *United States* v. *McCarthy,* (CA 3) 301 F.2d 796, 799.

2. The Hart woman talked to government agents again July 16, 1960, when she gave a 30-page statement. This was shortly before the grand jury convened and the government was in full investigation. Upon request (XVIII, 3492), Weinstein was later given a very small portion of the statement consisting of excerpts from several pages. It was not even coherent (Ex. 454, XVIII, 3558-3560; XIX, 3661). The remaining 28 or so pages were refused to defendants and marked court Exhibit "I" (XVII, 3503).

Here again, the very fact (if it be a fact) that Katherine Hart had nothing to say in Exhibit "I" (XVIII, 3503) about seeing Weinstein on that morning in October, 1958, would be of importance. The entire 30-page statement should have been turned over to counsel (XVIII, 3559) so she could be adequately cross-examined as to why she talked about what she did talk about, rather than what she testified concerning.

Certainly, the excising process should not destroy the continuity of the report as it did here, *Holmes v. United States,* (CA 4) 284 F.2d 716, 720.

B. Geraldine Deegan:

Geraldine Deegan and her husband were the chief government witnesses against Weinstein. The day before the trial started (September 12, 1961), Mrs. Deegan signed a statement for the government. She and her husband were named defendants. Up until that time she and her husband had maintained pleas of not guilty. It was important for Weinstein to be able to take her signed confession as a whole and then cross-examine her. However, the court excised a portion thereof.

The portion furnished defendant is marked Exhibit 407 (IV, 686); the deletion Exhibit C (IV, 649).

SPECIFICATION OF ERROR NO. V

The Evidence Showed no Single Conspiracy As Charged, But if Anything, A Group of Conspiracies.

At the end of the government's case, the defendant Weinstein moved for judgment of acquittal on the ground that the evidence showed no single conspiracy; therefore a variance existed. (XIX, 3685).

Motion denied (XIX, 3714).

At the end of all the evidence, Weinstein again moved for judgment of acquittal as follows:

> "There is a variance exists between the indictment and the proof in that the indictment alleges an overall, single conspiracy and, at the most, the government's proof was a series of small, disconnected, individual conspiracies." (XXIX, 5680)

Motion denied (XXIX, 5689).

When one joins with another in a criminal venture, it is not enough that *he knows* his confederate is engaged in other criminal undertakings with other persons, even though they be of the same general nature. The acts and declarations of confederates, past or future, are not competent against the party except *insofar as they are steps in furtherance of a purpose common to him and them.* Declarations become competent only when they are uttered in order to accomplish a common purpose.

This case involved six separate and distinct collisions. The only person who was tied into each of these six separate collisions was defendant George Barnard. The six collisions extended over a period of some 18 months.

Taking the six collisions in the order in which they occurred, we discuss briefly the persons involved in each (excepting George Barnard):

1. August 18, 1958 (Counts VII and VIII).

The persons in the cars were defendants Allison, John Barnard, Giegerich, and conspirator Page.

Weinstein was attorney for Allison, John Barnard and Page.

Six in all. There is no evidence of the involvement of any other defendant or conspirator.

2. September 11, 1958 (Count VI).

The occupants of the two vehicles were defendants Leland and Geraldine Deegan, Saunders, and Boisjolie, and conspirator Howerton.

Weinstein represented the Deegans and Saunders.

Seven in all. There is no evidence of the involvement of any other defendant or conspirator.

3. October 16, 1958 (Counts IV and V).

The occupants of the two vehicles were conspirators Gordon McCoy, Dunham, Miller, Rose and Swertfeger.

There was some evidence that defendants Saunders, Boisjolie, John Barnard and Knippel were involved.

Weinstein started to represent the occupants of the struck car—Gordon McCoy, Miller, Rose and Dunham, but turned them over to attorney Ben Gray. Weinstein loaned them money, which was repaid.

Eleven in all. There is no evidence of the involvement of any other defendant or conspirator.

4. January 18, 1959 (not in indictment.)

The occupants of the two vehicles were defendant Knippel and conspirators Kerr, James Barnard (this was neither George nor John) and Wooldridge.

Weinstein was asked by Kerr and Knippel to represent them. He referred them to attorney Ben Gray. Weinstein loaned them money, which was repaid.

Six in all. There is no evidence of the involvement of any other defendant or conspirator.

5. September 5, 1959 (Count III).

The persons in the cars were defendants Johnstone and DePlois, and conspirator Kimmel (Stewart).

There was some evidence that defendants Knippel and Lasiter were involved.

Six in all. There is no evidence that defendant Weinstein nor any other defendant or conspirator had any involvement with the matter whatsoever.

6. February 16, 1960 (Counts I and II).

The persons in the cars were defendants Smith and Haynes, conspirators Sanseri and Donovan McCoy.

Five in all. There is no evidence that defendant Weinstein nor any other defendant or conspirator had any involvement with the matter whatsoever.

Making the assumption that Weinstein was connected with "a conspiracy," it is obvious that there was more than one conspiracy. It is true that the thread of George Barnard ran through all of them, but that is far from being sufficient.

The evidence does not show any single, central, guiding over-all entity. At most it shows six separate collisions arranged by George Barnard. Each collision involved a different group. There is nothing to show that the other uninvolved defendants and conspirators had any interest in any collision other than the one or two in which he or she was directly involved.

True, in each collision you find George Barnard. But

there it ends. From there on the involved persons vary radically from collision to collision. The interests of the participants are confined to the single matter at hand—not to any over-all common purpose involving other matters.

This brings the case, insofar as Weinstein is concerned, within the purview of *Kotteakos v. United States,* 328 U.S. 750. Here the "George Barnard" was a Simon Brown. He was the common and key figure in all the transactions proven. However, that was as far as it went. Each transaction was separate. There was no connection between them *except* this Brown. Although each transaction had many features very similar to all the others, that did not create any single over-all conspiracy. It was a group of small, separate conspiracies, at least eight in all. This constituted a prejudicial, fatal variance.

Another important case is *Rocha v. United States,* (CA 9) 288 F.2d 545.

The "George Barnard" in this case was a Mary Drummond who arranged for American women to enter into fraudulent marriages so aliens could enter this country. There were six different marriages. Here again, although the purpose of each of the six transactions was the same, although Mary Drummond was the central figure in each, and although a number of the named participants knew each other, that was not sufficient.

This court said that it could see no basis for even an inference that any one "husband" was interested in

anyone's marriage or entry other than his own. The same could be paraphrased here to a large degree, substituting the word "collision" for the word "marriage". It was held there was no proof of any over-all conspiracy—merely six separate, individual and unconnected conspiracies. Thus a fatal variance existed.

Both the *Kotteakos* and *Rocha* cases make it clear that the participation of a "George Barnard" in all of the various separate and distinct crimes, related in kind though they might be, is not sufficient to permit lumping all together as a single conspiracy.

Perhaps the most significant thing that could be said in this regard is to quote a comment of the trial judge to the jury. This was made at a time when almost 3000 pages of testimony had been taken. It is an indication of the impact of the testimony on the trial judge regarding any "over-all" conspiracy:

> "THE COURT: I will instruct you also if I may at this time and finally when the case is concluded, that I now do not know and I am not sure that any of counsel know what the evidence will produce as to the date the conspiracy OR CONSPIRACIES terminated. That will be a matter which will probably be up to the jury to determine. If you determine that this testimony or this conversation was after ALL CONSPIRACIES had terminated, you will not consider it in any respect as in support of Count IX." (XV 2929)

At this point, over four-fifths of the government testimony had been heard.

SPECIFICATION OF ERROR NO. VI

The Trial Court Erred in Admitting Hearsay After the Termination of the Alleged Conspiracy.

The last specific overt act set forth in the conspiracy count (IX) is number 5, dated May 11, 1960 (R. 9).

Hearsay testimony should not have been received against any person not present subsequent to the date of the last alleged overt act (May 11, 1960).

Count IX also charges as overt acts each and all of the overt acts of the defendants and their conspirators alleged in the first eight counts (R. 1-7). In each of the first eight counts it was alleged that as a part of the scheme to defraud, the defendants would conceal that the collision was planned by the defendants and consented to by the occupants of the vehicles in advance of its occurrence. This did not extend the alleged conspiracy beyond May 11, 1960.

The court erroneously admitted a number of hearsay statements made subsequent to May 11, 1960. These occurred during the testimony of the defendant David Leon Boisjolie and the woman with whom he was living, Edith Thomas (now Boisjolie):

1.(a) Boisjolie testified that a postal inspector (Severtson) and a number of other officers came to see him where he was working at closing time, October 10, 1960. His "wife", Edith Thomas, was there. No other defendant was present. He was asked the following question:

"I will now ask you at six o'clock what, in the

presence of these people only, what you did and what you said?" (VI, 1198)

The following objection was made by Weinstein:

"MR. DWIGHT SCHWAB: Well, that is one thing, another thing is that they are attempting to bring in statements here or happenings, matters, that took place outside of the presence of any of the defendants in this case and, so, it would be wholly irrelevant and immaterial. Of course, we have an inference on an inference objection; that certainly is a valid objection. Another one is that sometime this conspiracy had to end, Your Honor, and this was at the end of 1960, shortly before the indictment came in. The last overt act that has been charged that I can recall happened in 1958 or early 1959 so, this would be a year and a half after that and the only possible way this would come in is if a conspiracy is established. Now, the Court is letting this evidence come in subject to the establishment later of a conspiracy, but there has to be some limitation somewhere and assuming that they can establish conspiracy this certainly is long after the conspiracy ended.

THE COURT: What about the matter that counsel was talking about, about their concealment? Does that matter of concealment continue?

MR. DWIGHT SCHWAB: That could go on forever, if that is what they are relying on, they could have brought this charge fifty years from now and tried these people, assuming they were still alive. I don't think that is a valid ground.

THE COURT: It's in the indictment.

MR. DWIGHT SCHWAB: That still doesn't make it good, Your Honor, there is a lot of things that could be in the indictment. The thing is it's over a year and a half after the last overt act that has been alleged in this case, the last overt act that is really an overt act in this case was in January, 1959, I believe that is the accident that is alleged in Count VII and VIII.

MR. BURBANK: Counsel is mistaken, Your Honor, the last overt act charged is on or about May 11, 1960.

MR. DWIGHT SCHWAB: What is that?

MR. BURBANK: George Barnard and Richard Sanseri delivered a bank draft in the amount of $600.

MR. DWIGHT SCHWAB: If they are going to rely on a bank draft that is still five months prior to the time they are talking about here."

* * * *

"THE COURT: I will overrule the objection, he may answer." (VII, 1203-1205)

The government had stated it intended to use this hearsay against Boisjolie's attorney and would identify the attorney as being Weinstein (VI, 1198, 1199).

Boisjolie testified in answer to the question:

"Edith was there and I told her to call my lawyer and that there was a man that was a post office inspector that wanted me to come in with him that night and he was accompanied with two other people, I told her." (VII, 1205)

1.(b) Edith Thomas ("Boisjolie" at the time she testified), the woman with whom Boisjolie was living, was asked about meeting Boisjolie the evening of October 10, 1960, when he saw the postal inspector (VII, 1368).

Weinstein objected as follows:

"MR. DWIGHT SCHWAB: I am going to object, one, on the ground that counsel is leading the witness, and, two, I am going to object, as previously, Your Honor, that this relates to matters that must have happened after any conclusion of any conspiracy which the Government might prove at some time in the future." (VII, 1369)

The objection was overruled (VII, 1369).

She then testified as follows:

"Q Can you tell us what took place when you met your husband at Howard Auto Supply about six o'clock that evening?
A He asked me to make a phone call.
Q Will you tell us, as best you can recall what your husband asked you to do?
A He asked me to call Phil Weinstein and see what he could do for him.
Q And what did you do thereafter?
A I called him at his home.
Q Called who?
A Phil Weinstein.
Q Did you have a conversation with Mr. Weinstein at that time?
A Oh, just that I told him Dave was downtown and that three men had picked him up and that one was a Postal Inspector and that Dave wanted to see if he could do something for him, and he told me to have Dave call him when he got home.
Q I see, and what did you do after you had made your phone call?
A I went home." (VII, 1370)

She made no other phone calls nor talked to anyone else (VII, 1370, 1371).

1.(c) Before midnight defendants Knippel and Lasiter came to her home (VII, 1372, 1373). The following then transpired:

"Q During the course of their stay was any conversation had by you with Mr. Knippel and Mr. Lasiter or any conversation had by Mr. Knippel and Mr. Lasiter in your presence?
A Yes.
MR. DWIGHT SCHWAB: Objection, Your Honor, on the grounds this is hearsay as far as my client is concerned and it is beyond any scope of

Count IX. In other words, it has no relevancy or competency or materiality.

THE COURT: Overruled.

* * * * *

MR. BURBANK: (Q) Now, Mrs. Boisjolie, will you tell us as best you can remember what was said by Mr. Knippel and said by Mr. Lasiter at that time?

MR. DWIGHT SCHWAB: The same objection.

THE COURT: Yes, and the limitation that has previously been given to the jury will apply to the particular statements made by this witness with reference to the conversation.

MR. BURBANK: Count IX, you mean, Your Honor?

THE COURT: Yes, the conversation in Count IX having to do with direct evidence with reference, applying to the persons who were present making the statement and only as part of the conspiracy Count IX, if and when later connected. Do you have the question, Mrs. Boisjolie?

A Yes.

THE COURT: All right, can you answer it?

A They talked about for Dave to keep his mouth shut.

THE COURT: Would you talk a little closer to the microphone, please?

A They said for me to tell Dave to keep his mouth shut about what, I don't know what they were talking about. I know now what it is all about.

MR. BURBANK: (Q) Well, Mrs. Boisjolie, I am concerned only with what they said at that time, as best you can recall.

A Well, it was just for Dave to keep his mouth shut, and it was best for him to leave town, that is what they said." (VII, 1374, 1375)

Thereafter, the same effect:

(VII, 1389)

"THE COURT: * * *. My understanding is that

there is a continuing objection to this. I will permit the examination further and will permit a continuing objection on the part of all defendants' counsel."

* * * * *

(VII, 1392)

"A That they thought that Dave should get out of town and that they were going to."

* * * * *

(VII, 1393)

"MR. BURBANK: (Q) After you spoke to Mr. Knippel and Mr. Lasiter on the subject of Mr. Boisjolie being downtown, what did Mr. Knippel and Mr. Lasiter say with respect to that, just that subject alone, if anything?

A. Just to tell Dave to keep his mouth shut."

The obvious purpose of the foregoing testimony was to show that Weinstein, upon receipt of the phone call from Edith Thomas at the instance of Boisjolie, sent Lasiter and Knippel over to Boisjolie. It was highly prejudicial.

2. While Boisjolie was testifying, he was asked what time he arrived home from talking to the postal inspector and he stated between twelve and one o'clock in the morning (VII, 1206). Boisjolie continued as follows:

"Q Can you tell me what happened within the next ten hours after your arrival at home?

A After I had gotten home, Edith had told me.

Q Not what was said to you, not what Edith told you, but what happened, what you observed, yourself?

MR. DWIGHT SCHWAB: May we have a continuing objection?

THE COURT: Yes, you may.

A Well, I went to bed about five or six in the morning, Willie Lasiter and Ray Knippel were there.

MR. KATZAN: Your Honor, I wish to again object on the same grounds previously stated during the recess.

THE COURT: You have a continuing objection, counsel.

* * * * *

MR. BURBANK: (Q) At that time was anyone present other than yourself, Ray Knippel and William Mack Lasiter?

A Edith was there, also.

Q At that time you heard a conversation take place?

A Yes.

Q Will you tell us as best you can recall what was said by Mr. Knippel, what was said by Mr. Lasiter and yourself on that occasion?

MR. RANSOM: I object to the question on the grounds that the question is hearsay evidence and substantive evidence of something that may have happened at that time. I do not believe this is admissible, it's irrelevant and immaterial and it is hearsay.

THE COURT: Overruled.

* * * * *

MR. KATZAN: Your Honor, it's my understanding that this objection applies to all the counts?

THE COURT: Yes.

A The conversation was that Willie and Ray were leaving town that hour.

MR. BURBANK: (Q) As best you can, Mr. Boisjolie, please tell us what was said by either Mr. Knippel or Mr. Lasiter to you, as best you can, the best you can presently recall, identifying the people who spoke.

A Well, Ray told me he was going over the mountain; that Willie was, as I take it, told me he was going to a ranch and that it would be best if I would leave town for a while.

Q Was anything further said at that time?

A Yes, I told them I couldn't afford to leave town.
Q Was there any response made to that comment of yours?
A Yes, *they told me to go down and get some money from Phil Weinstein.*
Q Who told you this?
A I am not sure which one told me.

* * * * *

MR. DWIGHT SCHWAB: I move to strike that question and answer, Your Honor, on the ground that it is very leading. I also ask the Court to strike the testimony of this episode which he just finished with, for the ground previously stated. [This motion referred to the objection set forth in ¶ 1.(a) supra (VII, 1203-1205).]

THE COURT: Overruled." (VII, 1206-1209)

Thereafter, Weinstein moved to strike all hearsay testimony given by Boisjolie as follows:

"MR. DWIGHT SCHWAB: I would like, Your Honor, before we start this morning, to move to strike all of the testimony which appears in the record that was taken from the witness on the stand, Boisjolie, concerning particularly matters that occurred around the fall of 1960, on the grounds, of course, that it is hearsay, and particularly on the ground it's being offered in connection with Count IX. If it is being offered in connection with Count IX that the conspiracy if there was one, was at an end. The only possible theory that conspiracy, as I understand it, could have continued up to that time, up until after sometime in the year 1959, is on the theory that these people got together and were concealing, they conspired to conceal, and that is no grounds at all for the theory of the continuation of the conspiracy, so I particularly would move to strike all of that testimony concerning what went on in the year, last half of 1959 and the year 1960, and I also move to strike all hearsay statements of this

witness insofar as they relate to my client.

THE COURT: Are you taking the position, Mr. Schwab, that there cannot be a conspiracy to conceal?

MR. DWIGHT SCHWAB: Yes, Your Honor.

THE COURT: Can't there be a conspiracy?

MR. DWIGHT SCHWAB: I haven't read it carefully but I think one case I am thinking of is the case of the United States v. Gruenwald, or Greenwald, where the Court indicated that if this were considered to be a continuation of the conspiracy it could go on forever, and I think that that well fits this case.

MR. BURBANK: On that point, Your Honor, it seems to me inherent in the particular conspiracy here charged that its efficacy to be recognized—

THE COURT: (Interposing) I am going to rule for you, don't argue unless you have to because we are losing time.

MR. RANSOM: I would join in Mr. Schwab's motion.

THE COURT: I understood that the motion is made for the benefit of all defendants' counsel, and the motion is denied." (VII, 1240-1242)

The prejudicial nature of this testimony is obvious. It becomes greater when it is coupled with Boisjolie's testimony that he got money from Weinstein just two weeks earlier. (See Specification of Error No. I, Page 30.)

3. Boisjolie testified as follows concerning a conversation he had with defendant Johnstone the day the indictments herein were being served:

"Q Did you subsequently meet Mr. Johnstone again?

A Yes, I did.

Q And when was that?

A That was just before the indictments were served on January 21, 1961, I believe. [The in-

dictment herein was returned January 20, 1961 (II, 325); it was filed that date (R. 1).]

Q Was it on January 21 that you met Mr. Johnstone, or is that when the indictments were served?

A The date that the indictments were served was the date that I had met him again.

Q All right, and where did you meet him?

A At Thorp's Restaurant.

Q Was anyone present other than yourself and Mr. Johnstone on that occasion?

A No.

Q Can you tell us whether or not the conversation occurred at that time?

A Yes, it was.

Q Can you tell us, again you understand my questions deal with the subject matter we have discussed heretofore?

A Yes.

Q Can you tell us what was said by Mr. Johnstone on that occasion and said by you to Mr. Johnstone, as best you can recall the words?

A Mr. Johnstone told me, he said that I would be picked up that day, the best thing for me to do would be to get out of town. I told him I couldn't afford it and he told me to go down to *Phil Weinstein and get some money*.

Q Was anything else said on this subject matter at that time at that place?

MR. DWIGHT SCHWAB: I move to strike that, Your Honor, on the grounds previously stated. [This motion refers to objections set forth in ¶ 1. (a) supra (VII, 1203-1205) and ¶ 2. supra (VII, 1240-1242).]

THE COURT: Motion denied, and the matter is permitted to be received under the admonition given to the jury previously that it is not to be binding on the other defendants unless it's subsequently tied in with some matter." (VII, 1251-1252)

Thus, we here have highly prejudicial hearsay of an event occurring not only long after the last overt act alleged (May 11, 1960), but which occurred even after the filing of the indictment.

4. Boisjolie was asked concerning further conversations occurring in October 1960 (VII, 1243, 1244):

> "MR. BURBANK: (Q) Now, Mr. Bosijolie, will you tell us, please, what was said by Mr. Lasiter to you, and by you to Mr. Lasiter on that occasion, as best you can presently recall?
>
> MR. DWIGHT SCHWAB: As far as my client is concerned we have a continuing objection that it is hearsay.
>
> THE COURT: Yes, and it will be admitted under the admonition previously given to the jury.
>
> MR. BURBANK: (Q) Do you recall the question, Mr. Boisjolie?
>
> A Yes, I do, Willie [Lasiter] was telling myself that Willie said that he was going to fix Ray Knippel at this time, that Ray had goofed by going back with his wife. He went through details on how he was going to do this and said that would happen to anyone else that squealed or goofed. (VII, 1244, 1245)

Then Boisjolie continued with the following hearsay conversation that took place in November 1960 as follows:

> "MR. BURBANK: (Q) Mr. Boisjolie, the best you can recall give us the words that were used by the respective people at that time, what they said and what was said in your presence at that time; where you can't recall specific words, give us the substance of the conversation. Now, what was said by these people?
>
> A Well, Willie said that Ray Knippel had approached a minor about being involved in a

crime, and that he would surely go to jail for it." (VII 1248)

* * * * *

"MR BURBANK: (Q) Mr. Boisjolie, did Mr. Lasiter say anything about the nature of the crime to which you have referred?

A Yes.

Q What did Mr. Lasiter say in that respect?

A It had to do with an accident, it had to do with an accident." (VII, 1249)

The foregoing testimony is prejudicial to Weinstein. It is hearsay. It has no relation to any count in the indictment. It occurred subsequent to the last overt act alleged.

The court recognized and acknowledged that objections were constantly made that hearsay was being admitted; that the court was instructing the jury that it was entitled to use the statements of any conspirators against all defendants (X, 1915).

Nothing is clearer than that in every instance the right of the government to introduce hearsay testimony against conspirators not present wholly ceases and terminates at the end of the conspiracy. The conspiracy ends with the last overt act alleged and proved. The rule is stated in *Paoli v. United States,* 352 U.S. 232, 237, as follows:

"This Court long has held that a declaration made by one conspirator, in furtherance of a conspiracy and prior to its termination, may be used against the other conspirators. However, when such a declaration is made by a conspirator *after the termination of the conspiracy, it may be used only*

> *against the declarant and under appropriate instructions to the jury.*" (Emphasis added.)

An annotation to the *Paoli* case entitled "Admissibility as against conspirator of extrajudicial declarations of coconspirator—Supreme Court Cases," 1 L.Ed. 2d 1780, states flatly at 1792:

> "Ordinarily an improper admission of an extrajudicial statement of a conspirator is reversible error."

Cited as authority for the above statement are the following cases:

> *Logan v. United States,* 144 U.S. 263.
> *Brown v. United States,* 150 U.S. 93.
> *Sparf v. United States,* 156 U.S. 51.
> *Fiswick v. United States,* 329 U.S. 211.
> *Krulewitch v. United States,* 336 U.S. 440.

The *Krulewitch* case at page 444 (336 U.S.) referred to the admission of hearsay against a co-conspirator as "this *narrow exception* to the hearsay rule," and refused to expand the rule at the request of the government.

> See also *Wong Sun v. United States,* 371 U.S. 471, 490; *Developments in the Law—Criminal Conspiracy,* 72 Harv. L. Rev. 922, 989-990.

A reading of the discussion between the court and counsel makes it clear that the court admitted the foregoing hearsay by reason of the insistence of the government that such was admissible.

The government argued that there was a *scheme to conceal* the fact that the collisions were planned by the

defendants and consented to by the occupants of the vehicles (VI, 1200; IX, 1746; X, 1915-1928).

We quote a small portion of the transcript to illustrate:

> "THE COURT: Now, take for example the one particular portion of the testimony that I recall where Mr. Knippel and Mr. Lasiter called on Mrs. Boisjolie while he was interviewed by Mr. Severtson.
>
> MR. BURBANK: Yes, sir.
>
> THE COURT: Which was on October 10, 1960.
>
> MR. BURBANK: That is right, sir.
>
> THE COURT: And after the May occurrence, that is an alleged as an overt act, the last overt act.
>
> MR. BURBANK: That is right, sir.
>
> THE COURT: Under the instructions I gave the jury at that time I said this applied to Count IX against the other co-conspirators if the government, in fact, subsequently has proved the conspiracy, didn't I?
>
> MR. BURBANK: That is right, sir.
>
> THE COURT: Was I in error?
>
> MR. BURBANK: I don't think so." (X, 1923)

The government was proceeding on the theory that concealment alleged in the indictment continued the conspiracy up to the time of the filing of the indictment on January 20, 1961.

It appears that the court was led into error by the government.

The law is very clear that a conspiracy is not continued by showing such concealment:

Krulewitch v. United States, 336 U.S. 440
Grunewald v. United States, 353 U.S. 391
Lutwak v. United States, 344 U.S. 604

The prejudicial nature of the foregoing testimony cannot be overemphasized.

In *Wong Sun v. United States,* 371 U.S. 471, 490, the court stated:

> "And where post-conspiracy declarations have been admitted, we have carefully ascertained that limiting instructions kept the jury from considering the contents with respect to the guilt of anyone but the declarant."

The court cited as authority:

> *Lutwak v. United States,* 344 U.S. 604, 618, 619; *Paoli v. United States,* 352 U.S. 232, 236, 237.

It is obvious herein that no such limiting instructions were given to the jury. To the contrary, the trial judge made it clear that he had admitted the above post-conspiracy declarations against all defendants.

* * * * *

At the end of the testimony Weinstein moved as follows:

> "The defendant Weinstein moves for a judgment of acquittal or, in the alternative, for a mistrial on the grounds that no conspiracy has been proved and no jury can possibly remove from consideration all of the prejudicial evidence which has been allowed in this case pursuant to Count IX.
>
> * * * *
>
> "The defendant Weinstein also moves for a judgment of acquittal and unless the Court denies that, in the event the Court denies that motion for a mistrial on the ground that the Court allowed in evidence, hearsay statements subsequent to the termination of any alleged conspiracy as stated in Count IX and subsequent to the last overt act

which was pleaded in Count IX on the grounds that there can be no furtherance of a conspiracy." (XXIX, 5680, 5681)

The motions were denied (XXIX, 5689).

However, just before denying the motions, the court stated it agreed with counsel that hearsay statements made after the termination of the conspiracy should not be used in any manner in furtherance of the conspiracy. The court agreed that concealment could not be an overt act extending the conspiracy. The court then went on to say it was of the opinion that it had instructed the jury by means of cautionary instructions that the hearsay statements applied only to those persons present *after a certain date*. However, *the court recognized that the termination date had never been mentioned to the jury*. The court then denied all motions, stating it did not desire to hear any argument (XXIX, 5687-5689).

Just before instructing the jury, the court went over the instructions with counsel. The court stated that it had changed its proposed instruction on conspiracy "to provide that the conspiracy is not ended until the date of the last overt act and proven. I realize that the United States doesn't like this but I think its the safest and best way to instruct the jury and then they will understand it. Are we ready?"

Weinstein's counsel then asked the court if it was "going to instruct [the jury] that definitely the conspiracy ended at the time of the last overt act, if there was a conspiracy at the time of the last overt act alleged in the indictment?"

The court stated: "Alleged and proven."

Weinstein's counsel then asked the question: "Alleged and proven?" To this there was no answer by the court. (XXIX, 5769) The court then went on to instruct the jury.

While instructing, the court read *in haec verba* the entire indictment.

Thus, the jury was told that in the conspiracy count (Count IX) that "Each and all of the overt acts of the defendants and their co-conspirators alleged in Counts I through VIII of this indictment, inclusive, are hereby realleged and incorporated by reference herein and designated as *overt acts* in furtherance of the conspiracy." (XXX, 5829)

Of course the jury was further told by a reading of the indictment that *in each of the first eight counts* was the following:

> "It was further a part of said scheme to defraud that the said defendants would *conceal* that the collision was planned by the defendants and others whose names are to the grand jury unknown and consented to by the occupants of said vehicles in advance of its occurrence." (XXX, 5816-5830).

The court then clinched it by later instructing the jury further:

> "You will recall that the conspiracy charged here alleges all of the overt acts done by the defendants, or any of them, in all of the previous counts as well as five different items." (XXX, 5860)

Without question all this made the *concealment* feature an integral overt act. Of course the court never

told the jury when the concealment would cease to be an overt act.

All the court said in instructing as to the ending of the conspiracy was the following:

> "A conspiracy is not ended until the date of the last overt act alleged and proven." (XXX, 5861)

The court also instructed the jury that the hearsay statements made during the existence of the conspiracy by one of the conspirators could be considered against the others (XXX, 5865).

Weinstein excepted to the instructions on conspiracy, the ending of conspiracy, and hearsay, as follows:

> "Page 28 where the Court is talking about conspiracy and overt acts and when the conspiracy ended, I realize that the Court changed its instruction over the way that it was originally submitted, but the Court has still failed to tell the jury when the conspiracy ended by telling them about when the last overt acts was committed or when the last overt act was committed that was proven in this case. So, the jury has been, I feel, allowed to speculate on this whole matter of the ending of this supposed conspiracy and that this conspiracy, as I sat here and listened to these conspiracy instructions, I feel that the whole matter is so vague and unsure in the jury's minds that I am convinced that they haven't the slightest conception, Your Honor, of when this conspiracy, if it ever started, ended, as to what can be used as evidence on the time factor and what evidence can be used and what cannot be used.
>
> Much of the evidence in this case or some of the evidence, at least, that would be important on this conspiracy matter was never identified as to the exact date and even if the Court in this case did

tell the jury that the conspiracy ended at a particular date the jury would still be unsure and unable to know whether some of the conspiracy happened before or after that date but, at any rate, I feel that the Court should have told the jury specifically when the conspiracy ended, I feel that is the function of the Court." (XXX, 5889, 5890)

Damaging hearsay testimony was admitted against Weinstein which could not have been other than extremely prejudicial. The following language from *Blumenthal v. United States,* 332 U.S. 539, 551, is particularly appropriate here:

> "If therefore it were shown, or even were doubtful, that the admissions had been improperly received as against Blumenthal, Feigenbaum and Abel, reversal would be required as to them."

SPECIFICATION OF ERROR NO. VII

The Trial Court Erred in Instructing the Jury on Proof of the Existence of a Conspiracy.

The court instructed the jury as follows:

> "Persons may be guilty of being parties to a conspiracy though the objects of the conspiracy were never accomplished. On the other hand, proof concerning the accomplishment of the objects of a conspiracy is the most persuasive evidence of the existence of the conspiracy itself. * * * ." (XXX, 5862)

To this instruction Weinstein excepted as follows:

> "I feel that this is a prejudicial instruction and I do not think that it's the law, at least, I have never run into that. And I feel that to allow the jury to look and to say, 'Well, the objects of this conspiracy as it would appear the government wants us to think it existed, were accomplished is persuasive evidence that it existed.'

"In the first place, I feel it is lifting yourself by your own bootstraps." (XXX, 5891)

This instruction could not be correct. The object of the alleged conspiracy was obviously to obtain settlement money from insurance companies. The evidence clearly showed that various sums were obtained in settlement of the collisions alleged in the various counts. Thus, the court by the above instruction directed a verdict of guilty on the conspiracy count.

Suppose for the moment that the collisions had been legitimate; that the various persons involved with injuries collected claims from the same insurance companies. Such would have been an innocent and proper act. Yet, pursuant to the above instruction, the jury would have been told to bring in a verdict for the government, by reason of the fact that the OBJECT of settlement for injuries from the insurance companies would have been obtained.

The instruction cannot be the law. The instruction is misleading and highly prejudicial. It, in effect, directed a verdict of guilty by reason of the mere fact that money was obtained from insurance companies.

SPECIFICATION OF ERROR NO. VIII

The Trial Court Erred in Limiting Oral Argument by Weinstein to One Hour.

In its instructions to the jury, the court stated:

"I need not remind you that this case bristles with issues of veracity. In instances too numerous

> to specify, the testimony of the witnesses called by the government is flatly contradicted by the testimony of the defendants * * * ." (XXX, 5849, 5850)

The government called 84 witnesses. Weinstein called 25 witnesses; making a total of 109 witnesses. Exhibits received in evidence consisted of 247 marked as government exhibits and 160 marked as exhibits for defendants, a total of 407 exhibits. The trial commenced September 13, 1961, and ended November 10, 1961. The reporter's transcript is in excess of 6,000 pages. Toward the end of the trial the court proposed giving an aggregate total of four hours to all ten defendants for final argument (XXVI, 5199). One of the attorneys suggested that ten hours would be required, to which the court replied:

> "THE COURT: Oh, that is too much, I am not going to allow that. You wanted to know what my idea is and I have given it to you. I don't intend to invite argument on it, counsel." (XXVI, 5200).

Near the close of the testimony, the court was upset because the taking of testimony had not ended that day (Friday) (XXVIII, 5585, 5588, 5589).

The court stated:

> "THE COURT: I hoped that we would be through in time tonight so that I could give you some sets of instructions that I prepared besides the verdict form but I am not going to do it until the testimony is through, if ever, I mean if it is ever through, not that I will ever give it to you." (XXVIII, 5590)

Thereafter the court remarked that its estimate for the time of argument was adequate (XXVIII, 5592); the court stated it was allowing a total of four hours to all

ten defense counsel (XXVIII, 5593). The following then transpired:

> "THE COURT: Well, I think defendants' counsel should confer and decide how they want to divide up the time if there is any possibility of it.
>
> MR. GROSS: We are being given, as I understand it, four hours.
>
> THE COURT: That is right.
>
> MR. GROSS: That is twenty-four minutes and divided by the number of clients, twenty-four minutes apiece for argument. As far as I am concerned that would be the very least that I would take.
>
> MR. DWIGHT SCHWAB: Your Honor, there is hardly any use in defendants' counsel conferring on that because I am sure that no one is going to be able to give up twenty-four precious minutes or any portion thereof. In a case like this that has gone on this length of time you can hardly get started in twenty-four minutes and for the government to have two hours and to give each of these defendants' counsel twenty-four minutes I think is grossly unfair.
>
> THE COURT: What do you think you ought to have?
>
> MR. DWIGHT SCHWAB: I think the government ought to have twenty-four minutes, too, or something close to it.
>
> THE COURT: Now, let's be reasonable, counsel, what do you think you ought to have?
>
> MR. DWIGHT SCHWAB: Your Honor, I think that every counsel here should have at least forty-five minutes to put on his case to make his arguments. Almost any case that is argued over in the Circuit Court that takes two days to try, there is few lawyers argue less than forty-five minutes." (XXVIII, 5593, 5594)

The court then indicated it might give Weinstein and George Barnard more time, but the court could not see

everybody arguing for an hour or even forty-five minutes (XXVIII, 5594, 5595).

Weinstein then urged the court to hear argument on motions at the end of the evidence, and asked the court if the court would listen. [The court had requested no argument on motions at the end of the government's case (XIX, 3669).] The court indicated it was not disposed to listen to argument (XXVIII, 5595).

Later the court said:

> "And in view of the fact that your man [George Barnard] is named in nine counts, in view of the fact that Mr. Weinstein has presented by far the greater amount of testimony in the case in his own defense, I feel that there should be additional time allowed to you [George Barnard] and additional time allowed to Mr. Schwab." (XXIX, 5664)

Thereafter the court granted each of the defendants 30 minutes for final argument except Weinstein and George Barnard, one hour each (XXIX, 5696).

Defendant Johnstone (Count III) through his attorney Paulson objected. The court replied:

> "Is there anything you wouldn't object to?" (XXIX, 5696)

At the beginning of argument, Weinstein's counsel stated to the jury:

> "To begin with when we have been going here for as long as we have somewhere between seven and eight weeks I think you realize as well as I do that in an hour it is just impossible to just anymore than hit the high spots, and that is what I am trying to do, I am going to try to get over as much as I can in the time that has been allotted. * * * ." (XXIX, 5725)

After 55 minutes of argument, the court stated:

> "Five minutes more.
> MR. DWIGHT SCHWAB: Thank you, Your Honor." (XXIX, 5750)

Shortly after, upon indication from the court, Weinstein's counsel stated:

> " * * * is my time up, Your Honor? Just one moment." (XXIX, 5756)

Thereafter, Weinstein excepted to the limitation of argument as follows:

> "I further, and this is beyond the instruction, would like to except to the limitation of argument in this case as a denial of counsel under the Sixth Amendment of the United States Constitution to fully argue the case to the jury. I felt yesterday, although the Court granted an hour for argument, that I was just barely able to skim the issues, particularly in a case that started before the middle of September and has gone on as long as this one has and has involved a number of witnesses and a number of exhibits, not only the number of exhibits but the voluminous character of a lot of those exhibits, that to attempt to argue the case in that length of time to the jury and more than just barely skim the surface is impossible." (XXX, 5891, 5892)

It was obvious that the court intended to drastically limit argument—that no full-scale argument would be allowed. It cannot be properly suggested that Weinstein's counsel indicated to the court that adequate argument could be presented in anywhere near 45 minutes. Exhortation with the court was futile. The court was most insistent on concluding the case quickly, and made clear its intention so to do.

What was a proper length of time to allow Weinstein to argue a case that "bristled with issues of veracity," under the circumstances?

In *Rossi* v. *United States,* (CA 8) 9 F.2d 362, over objection of defense counsel, he was limited to 15 minutes oral argument. The Circuit Court reversed and ordered a new trial, holding an abuse of discretion. There were 13 witnesses and the evidence covered 54 printed pages. There was one transaction involved, i.e., a narcotics buy on a street corner. In addition, the defendant's counsel wanted to discuss the credibility of one witness.

In the *Rossi* case, in arriving at what was unreasonable, the court reviewed a number of state decisions as follows: *White* v. *People,* 90 Ill. 117, 32 Am. Rep. 12 (9 witnesses, limitation 5 minutes); *McLean* v. *State,* 32 Tex. Cr. R. 521, 24 S.W. 898 (many witnesses, limitation 17 minutes); *Jones* v. *Commonwealth,* 87 Va. 63, 12 S.E. 226 (17 witnesses, limitation thirty minutes); *Walker* v. *State,* 32 Tex. Cr. R. 175, 22 S.W. 685 (12 witnesses, limitation 45 minutes); *Huntley* v. *State,* (Tex. Cr. App.) 34 S.W. 923 (11 witnesses, limitation 15 minutes); *People* v. *McMullen,* 300 Ill. 383, 133 N.E. 328 (limitation 35 minutes); *People* v. *Green,* 99 Cal. 564, 34 P. 231 (24 witnesses, limitation one hour); *State* v. *Rogoway,* 45 Or. 601, 78 P. 987, 81 P. 234 (22 witnesses, limitation one hour). (9 F.2d 362, 368).

It would seem obvious that if 15 minutes is too short a time to comment on one fleeting narcotics buy plus credibility of one witness, one hour to comment on 50 to 100 factual questions extending over an 18-month pe-

riod plus the credibility of dozens of witnesses, is patently unreasonable.

In *York* v. *United States,* (CA 6), 299 F. 778, 20 minutes was allowed for argument. The evidence was circumstantial. The trial had taken a part of two days. There were important differences of recollection between court and counsel as to testimony. The evidence covered 233 pages when transcribed. This was held to be reversible error.

In *Parker* v. *United States,* (CA 6), 2 F.2d 710, the trial court was held to have unreasonably restricted the time of argument. The Court of Appeals stated at page 711:

> "There were 12 witnesses at the trial. It lasted during the day. The charge was felony, and resulted in conviction and sentence of a year in the penitentiary. The importance of the issues and the conflict of proofs did not justify summary treatment. Defendant's counsel was allowed only 20 minutes for argument."

One of the state court cases relied on in the *Rossi* case (9 F.2d 362) is *State* v. *Rogoway,* 45 Or. 601, 78 P. 987, 81 P. 234. The opinion is by Justice Robert S. Bean (later Judge of the United States District Court for the District of Oregon). In the original opinion, Justice Bean felt that although one-hour argument time to which defendant's counsel was limited was quite short, nevertheless it was not an abuse of discretion. However, on rehearing, Justice Bean ruled that the Sixth Amendment gives an accused the right to the assistance of counsel for his defense. "This means that the accused shall have

the right to be fully and fairly heard, or else it means nothing. Anything less would be an invasion and restriction of the right guaranteed." (45 Or. at 612)

Quoting from another case, Justice Bean continued:

> " ' * * * it may be regarded as settled law in American courts that any abridgement of this right which deprives the accused on trial of the time necessary to make his defense fully and fairly is an error, for which a new trial will be granted; * * * .' "

As an appropriate yardstick to be applied, Justice Bean quoted from *People* v. *Green,* 99 Cal. 564, 34 P. 231, to the effect that the limit of argument is reached when counsel ceases to " 'confine its range to the facts and law of the case,' " but that " 'while counsel speak to the point, and proceed in good faith, wasting no time, how can the court forbear to be patient, and hear what is said? When it is manifest that the discussion is complete and the subject exhausted, a stop may be ordered.' " (45 Or. at 613)

That the factual situation in *State* v. *Rogoway* is pertinent is shown by the following quotation from page 614, (45 Or.):

> "It required the greater part of three days to try the case. There were twenty-one or twenty-two witnesses examined, the testimony of whom, when transcribed and typewritten, filled a volume of 160 pages, and there were fifty-one exhibits introduced in evidence. Much of this testimony was circumstantial and conflicting, and the case was attended with many complications that required careful analysis on the part of counsel both for the State and for the defendant. Notwithstanding this, the court, at the close of the testimony, informed counsel that

but one hour would be allowed on a side for the argument of the case." (45 Or. at 614)

State v. *Mayo,* 42 Wash. 540, 85 P 251, was decided on federal constitutional grounds. The trial court limited argument to an hour and a half on each side. The trial consumed something more than four days; 20 witnesses were examined; the evidence made a typewritten transcript of nearly 500 pages. The Washington Supreme Court reversed.

A recent case is *State* v. *St. Clair,* 3 Utah 2d 230, 282 P.2d 323. There nine witnesses were called by the state and seven for the defendant, a total of 16. In reversing conviction, the court stated as follows (331, 332 of 282 P.2d):

"In the case at bar nine witnesses were called on behalf of the State and seven for the defendant, a total of sixteen."

The court then continued:

"The forty minutes allowed for argument would give less than three minutes per witness for discussion of the testimony, without allowing any time for the necessary generalities in opening and closing and presenting the over-all application of the theory of the defense and the conclusion to be drawn therefrom."

The court then added:

"Expedition in trials is to be commended, yet it should not be allowed to sacrifice thoroughness, nor a full and careful coverage of every essential part of the proceeding."

See also *State* v. *Ballenger,* 202 S.C. 155, 24 S.E. 2d 175.

All of the evidence against Weinstein was circumstantial. Basically Weinstein was caught in a web of guilt by association. No witness said "Weinstein knew these accidents were staged," or the like. However, by surrounding him with several dozen guilty defendants and conspirators—by showing that Weinstein represented many of them—that he paid many of them money—by weeks of hearsay and innunendo—Weinstein was presented with a monumental task of disassociation and explanation.

Actually, there were only about eight government witnesses that had anything of consequence to say about Weinstein (See Appendix, Infra, 178). But, in order to get this most significant fact across to the jury at the end, Weinstein had to carefully review with the jurors what the many other government witnesses had really said—and more importantly, what they *had not said*. The jurors could not do this themselves. This is peculiarly the job of counsel.

After disassociating himself from the testimony of the great mass of witnesses, analysis could then be made of the testimony of the eight government witnesses who *had* something to say about Weinstein. Without this, Weinstein remained where he was placed by the mountain of undigested evidence—inexorably tangled and entwined with a group of petty criminals.

The same process was required with the government exhibits. Here, again, the quantity of documents and papers, many of which related to, or were originated by Weinstein, was bound to be confusing to the jury, unless

Weinstein could adequately discuss them. If he had had time he could explain and show that many of them really meant nothing as far as he was concerned—that those that did had a proper purpose and a logical explanation.

This could not be done by means of sweeping generalities. Painstaking, perhaps time-consuming, analysis and explanation was the only feasible method. To perform this task is one of the main purposes for having a lawyer.

So too with Weinstein's own evidence. It extended for over 1000 pages (XXI, 4182 - XXVII, 5226).

He called 25 witnesses.

He introduced approximately 100 exhibits.

It too required careful analysis and explanation to show where each witness and exhibit was important, and how such related to the government evidence.

For one example, doctor and hospital reports were introduced on practically every Weinstein client involved. All these indicated injury—some permanent in nature. The importance of these as relating to Weinstein's guilty knowledge required careful explanation and analysis in relation to the testimony of the various government witnesses. — Each Weinstein exhibit had significance. Without explanation, the purpose was completely lost on the jury; in fact, his exhibits merely added to the confusion, mass and clutter.

It is no answer to say that the government with 10 defendants had only a couple of hours of time to argue. The government had the advantage of Weinstein's being

surrounded by nine active co-defendants, against all of whom there was direct evidence of guilt. The government also had the advantage of five additional confessed defendants, all of whom testified to their guilt. In addition, the government had many co-conspirators who confessed guilt on the stand, or against whom there was direct evidence of guilt. The majority of these people had been Weinstein's clients and Weinstein had paid money to them. The government did not need to argue at all. The burden at that point was truly on Weinstein to explain and to cleanse himself in the eyes of the jury.

Weinstein did not ask to be tried *en masse*. The government insisted over his continued protest. (See Specification of Error No. II, supra.) Therefore, the least Weinstein could expect was that his attorney be accorded enough time to systematically assimilate and analyze *all* the evidence, so it would not be dumped, a half-digested, prejudicial and confusing mass, on the jury.

Anything less was a deprivation of his constitutional rights under the Sixth Amendment. One hour was unreasonable under *any* standard of measure.

SPECIFICATION OF ERROR NO. IX

The Matters Involved Were Primarily of Local Concern

Just before commencement of the trial Weinstein filed a motion which stated in part as follows:

> "Independently of the foregoing grounds and the grounds set forth in my previous motion for a separate trial I urge this:
>
> (1) I have been a resident and citizen of the State of Oregon since my birth.

(2) The crimes with which I am charged are in substance matters of local concern. The fact of the indictment shows that any violation of federal criminal law is merely incidental and is being used by the government to try me in federal court on charges which, if true, should be brought against me in state court." (R. 84)

On the same day that he filed the motion, Weinstein told the court in argument of the motion as follows:

"One other thing, your Honor, that I think hasn't been mentioned that I think should be mentioned, at least, I am going to have more to say on later on in the trial, I think there is little question that if there is an offense stated here at all, that it is a violation of State law, and that Federal law is being dragged in by the weakest of links. The United States Supreme Court has had several things to say about trials for mail fraud where actually the basic violation was a violation of State law. As I say, if there was to be a trial in this case, it should have been in State court. Under Oregon law, as was pointed out in our motions, there is no question that each and every one of these defendants was entitled to a separate trial. That has been the law of Oregon since before Oregon became a State. It's the law of Oregon today, and by the more or less device of bringing this case as a mail fraud case in Federal Court is the only reason that my client cannot have a separate trial, which he would certainly be entitled to as a matter of right, and he could not and he should not be denied it in Federal Court." (I, 36, 37).

This case is a prime example of federal encroachment on local law. Bizarre attempts were made to make it appear that a large, vicious nation-wide "syndicate" was the target of the prosecution, (e.g. VI, 1120; VIII, 1557; IX, 1672, 1739, 1743).

Before the government rested however, it became obvious that the court was dealing with a handful of "local two-bit crooks." There was no substantial evidence of anything beyond that. There was no substantial reason for the federal government to inject itself into the picture. Oregon authorities could have easily and efficiently dealt with the matter under local law.

However, as pointed out elsewhere, Weinstein was the prime target. The only way he could be enmeshed was in a long conspiracy trial, thus sinking him in hearsay and confusion.

Surely the mails were used, but the use of the mails here was akin to violation of tax laws by the extortionists in *Rutkin* v. *United States,* 343 U.S. 130. It was a wholly casual, incidental use of the mail with no sinister implications. In the *Rutkin* case, Mr. Justice Black, writing for four of the Justices, wondered why the government bothered with what was primarily local law violations and answered his own question thusly: at page 141 of 343 U.S.:

> " * * * the only other reason that occurs to me—to give Washington more and more power to punish purely local crimes such as embezzlement and extortion. Today's decision illustrates an expansion of federal criminal jurisdiction into fields of law enforcement heretofore wholly left to states and local communities. I doubt if this expansion is wise from the standpoint of the United States or the states.
>
> In sofar as the United States is concerned, many think that taking over enforcement of local criminal laws lowers the prestige of the federal system of justice."

Justice Black then went on to point out reasons why the federal courts should not enter into matters of a local nature for whatever reasons may appear to be good and sufficient at the time, as follows: (Page 142 of 343 U.S.)

> "Federal encroachment upon local criminal jurisdiction can also be very injurious to the states. Extortion, robbery, embezzlement and offenses of that nature are traditionally matters of local concern. The precise elements of these offenses as well as the problems underlying them vary from state to state. Federal assumption of the job of enforcing these laws must of necessity tend to free the states from a sense of responsibility for their own local conditions. Even when states attempt to play their traditional role in the field of law enforcement, the overriding federal authority forces them to surrender control over the manner and policy of construing and applying their own laws. State courts not only lose control over the interpretation of their own laws, but also are deprived of the chance to use the discretion vested in them by state legislatures to impose sentences in accordance with local ideas."

The court points out that crimes such as extortion, robbery, embezzlement, and offenses of that nature, are traditionally matters of local concern. So too, obtaining money by false pretenses by a small gang of local bad men.

Justice Black ends up his opinion (next to last paragraph) with the following statement (page 147 of 343 U.S.):

> "My study of this record leads me to believe that the fantastic story of supposed extortion told here would probably never have been accepted by a jury if presented in a trial uncolored by the manifold other inflammatory matters which took up 887 of the 900 pages in this 'tax evasion' case."

So, also, had Weinstein been accorded a separate trial.

The proposition is well stated by this court in *Twitchell* v. *United States,* (CA 9) 313 F.2d 425, 428:

> " * * * It is not the business of federal prosecutors to prosecute for state offenses, or of federal courts to entertain such prosecutions. And we think that federal courts must be on guard against attempts to convert what are essentially offenses against state laws into federal crimes via the conspiracy route."

Weinstein cites this to the court being aware of the language of the court on page 429 concerning mail fraud cases.

CONCLUSION

The judgment should be reversed for the reasons aforesaid.

On the questions raised as to the admission and rejection of evidence, the instructions to the jury and the limitation of argument, it cannot be said that the error did not influence the jury, or have but very slight effect. *Kotteakos* v. *United States,* 328 U.S. 750, 764. *Griffin* v. *United States,* 336 U.S. 704, 709. *Hawkins* v. *United States,* 358 U.S. 74, 79. *Thurman* v. *United States,* (CA 9), 316 F.2d 205, 206.

Respectfully Submitted,

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APPENDIX

In the foregoing Specification of Error No. I entitled "The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal," Weinstein viewed all of the evidence from the standpoint most favorable to the government. All witnesses were assumed to be speaking the truth. In many instances, this was a violent assumption, but nevertheless made.

It is now necessary to set forth evidence which bears out Weinstein's contention that he did not know the collisions involved were staged—that he was himself a victim. This is of importance for the following reasons:

1. Where evidence of guilt is weak and questionable, then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt:

Glasser v. United States, 315 U.S. 60, 67.
Fiswick v. United States, 329 U.S. 211, 220.
Kotteakos v. United States, 328 U.S. 750, 763.
Krulewitch v. United States, 336 U.S. 440, 445.

2. In the statement of the facts in connection with the specification of error on the insufficiency of the evidence (No. I), Weinstein bent over backward in viewing the evidence most favorably to the government. Cases of doubt were resolved against Weinstein. Therefore, a portion of the evidence hereafter set forth in this Appendix may well be of a character that can be

considered by the court in connection with the motion for judgment of acquittal.

3. In *Lyda v. United States,* (CA 9) 321 F.2d 788, this court, in discussing the matter of credibility of an accomplice, said at page 795:

> "Obviously there comes a point when the witness' qualifications are so shoddy that a verdict of acquittal should have been directed."

In many cases testimony of government witnesses was "incredible or unsubstantial on its face."

4. Also, the matters set forth in this Appendix have a bearing on the specification of error relating to the limitation on argument (No. VIII). If ample time had been granted to fully argue this case, the matters as set forth in this Appendix could have been gone into fully and explained to the jury.

EVIDENCE SHOWING THAT WEINSTEIN HAD NO CRIMINAL KNOWLEDGE—THAT HE HIMSELF WAS A VICTIM OF A GROUP OF MINOR CRIMINALS IS NOW SET FORTH.

It is discussed under the following heads:

I—No one told Weinstein that the collisions were staged—no one testified that Weinstein knew the collisions were staged.

II—A number of the participants were actually injured.

III—Medical reports showed injuries to all, and a number of the "victims" were hospitalized.

IV—Police reports showed no suspicious circumstances.

V—Weinstein was fooled, and so were a lot of others.

VI—All persons dealing with Weinstein, even in an adverse capacity, said he was fair and honorable.

VII—Weinstein's conviction necessarily rests on the testimony of admitted perjurers and liars; persons with strong reason to favor the government in testimony against Weinstein.

VIII—Weinstein was the prime target.

IX—Weinstein processed and handled the staged collision cases the same as he handled all of the rest of his cases—He had a tremendous volume of business.

I

No One Told Weinstein That The Collisions Were Staged—No One Testified That Weinstein Knew The Collisions Were Staged.

There is considerable testimony that Weinstein was misled as to the character of several of the collisions by the participants. Being less than honest with one's own attorney is not anything new. Witnesses affirmatively testifying as to their attempts to mislead Weinstein, or as to his lack of knowledge, are:

Counts I, II and III—Weinstein not involved.

Counts IV and V—Gordon McCoy (IX, 1676-1678); Keith Rose (X, 1844).

Count VI—Mr. Deegan (III, 463, 464, 472, 473, 480); Mrs. Deegan (IV, 689, 709, 710, 718); Ray Carskadon [Deegans' attorney] (XXVI, 5180, 5181).

Counts VII and VIII—No evidence.

Collision of January 7, 1959—No evidence.

There is no testimony that anyone told Weinstein about any collision being staged.

There is no testimony that Weinstein knew any collision was staged.

II

A Number of the Participants Were Actually Injured.

Despite the nature of the collisions, many of the participants received actual injury. Of course Weinstein knew of the injuries. Such knowledge would allay any possible suspicion.

Leland and Geraldine Deegan:

Although they were doing their best to disclaim all injury, both Deegans were hurt. Dr. Joe Davis, an outstanding orthopedist (XXII, 4385-4387, 4390, 4398), and Dr. Gregg Wood (XXII, 4230, 4231, 4248, 4250), both found involuntary muscle spasm in both Deegans. Dr. Wood's first examination was nearly four months after the collision (XXII, 4228).

Darrel Saunders:

Dr. H. Freeman Fitch found injury—objective findings (Exs. 147-A B B, 479). Saunders had muscle spasm in his neck (XXIII, 4418, 4457).

Keith Rose:

Rose told Weinstein on his first visit to his office that he was seriously hurt (IX, 1760). He testified he was really hurt (X, 1808, 1814). He was actually treated by seven doctors in all (X, 1826-1834). He was in the hospital for ten days (X, 1829).

Gordon McCoy:

Gordon McCoy admitted he had injury (IX, 1641, 1646, 1648, 1656).

Dr. Howard Cherry, also an outstanding orthopedist in the Portland area, testified that McCoy was hurt (XXIII, 4501, 4530, 4533); his office file so shows (Exs. 148, 483).

John Barnard:

Dr. Paul Campbell, orthopedist, the treating doctor, found injury to Barnard (Ex. 490-A); also Dr. Lester E. Chauncey, the insurance company examining doctor (Ex. 490-B). Weinstein had previously represented Barnard and knew his pre-existing physical condition as shown by 1957 medical reports (Exs. 480, 481).

Ronald Allison:

The investigating police officer stated in his report

that Allison had major injuries (Ex. 431; XII, 2383). James Minor, the investigating insurance adjuster of 25-years experience (XIV, 2605, 2606), said *Allison's injuries were apparent* (XIV, 2652); he visited Allison at the hospital (XIV, 2653); Weinstein also visited Allison at the hospital (XXIV, 4750). Dr. Joe Davis reported to Weinstein that Allison had permanent injuries (XXIII, 4408).

James Page:

James Page (Counts VII and VIII) had objective findings of injury (Exs. 477-A and B).

Conrad Kerr:

Kerr, a government witness, testified over a year and a half after the collision, and stated he was still injured (XVII, 3250). He was a patient in Portland Sanitarium Hospital 28 days, where he was in traction (XVII, 3261, 3262).

III

Medical Reports Showed Injuries to All, And a Number of the "Victims" Were Hospitalized.

Two expert witnesses testified as to how the average lawyer in the Portland area representing personal injury clients would handle cases coming to him (John D. Ryan, XXIV, 4610; Nels Peterson (XXV, 4900). The testimony of both witnesses showed that plaintiff's attorneys necessarily place great reliance on the contents of medical and hospital reports.

Leland Deegan and Geraldine Deegan:

Dr. Joe Davis (Exs. 467, 469) and Dr. Gregg Wood (Exs. 466, 468), both showed objective findings of injury in written reports to Weinstein. Physiotherapy was prescribed with Dr. Arthur Jones (XXII, 4389) and St. Vincents Hospital. Back braces were prescribed (Exs. 467, 469; XXII, 4399).

Darrel Saunders:

Saunders was hospitalized at Providence Hospital for about a week; the hospital record shows injury (Ex. 474); Dr. H. Freeman Fitch wrote a report to Weinstein showing objective findings of injury (Ex. 479).

Ronald Allison:

Allison had a long hospitalization at Providence Hospital; the hospital record shows injury (Ex. 471), as do the reports from Dr. Davis to Weinstein (Exs. 478-A and B). Allison was examined by two insurance company doctors, copies of whose reports had been given to Weinstein. Both insurance reports show injury (Exs. 491-A and B).

John Barnard:

Weinstein had medical reports from John Barnard's doctor showing injuries which indicated serious trouble (Ex. 490-A), as well as from the insurance company's doctor (Ex. 490-B; XXIV, 4745).

James Page:

Page was hospitalized for a considerable period; his hospital records indicate injury (Ex. 475). Weinstein had medical reports from Dr. Davis, the treating doctor, which show injury (Exs. 477-A and B).

Weinstein also had copies of medical reports from doctors who examined Page for the insurance company, being Dr. F. A. Short (Ex. 492-A) and Dr. Lester Chauncey (Ex. 492-B); both show injury to Page.

Gordon McCoy:

McCoy was hospitalized in Providence Hospital. His hospital record shows injury (Ex. 473). Attorney medical reports from Dr. Howard Cherry, three in all show injury, (Exs. 482-A, B and C).

Keith I. Rose:

Rose was hospitalized ten days in Providence Hospital (X, 1829); his hospital records show injury (Ex. 476).

Conrad Kerr:

Kerr was a patient in Portland Sanitarium Hospital for 28 days following the collision (XVII, 3261).

There can be no doubt that a busy, experienced personal injury lawyer with the foregoing medical information would reasonably assume the legitimacy of the collisions in question, with never a contrary thought. It seems inconceivable that all these people would inten-

tionally permit themselves to be maimed! Apparently that is what happened here.

IV

Police Reports Showed No Suspicious Circumstances

Much reliance is placed by plaintiff's attorneys on the report of the investigating police officers. As to the three collisions in the indictment which involved Weinstein:

> The police report for the collision on August 18, 1958, (Counts VII and VIII) is Exhibit 431.
>
> The police report for the collision of September 11, 1958 (Count VI) is Exhibit 402.
>
> The police report for the collision of October 16, 1958, (Counts IV and V) is Exhibit 412 Id. Testimony concerning the report was given by the investigating officer (VI, 1058-1063). [The report could not be offered in evidence because of notations added in red (VI, 1062-1063)].

None of the reports raise any suspicion—to the contrary, they would allay any suspicion.

V

Weinstein Was Fooled And So Were A Lot of Others.

Weinstein was the victim of this small group of clients. He was fooled the same as a sizable number of insurance companies, executives and adjusters, attorneys, doctors and hospitals.

Weinstein was an experienced attorney, but so were the other victims experienced in their respective fields.

It might be said perhaps that all should have known better—should have recognized what was happening. BUT EACH AND EVERY ONE OF THE FOLLOWING WERE FOOLED, JUST AS WEINSTEIN WAS FOOLED:

Insurance Companies:

All of the following insurance companies paid out money, some in substantial amounts, to participants in staged collisions, as alleged in the indictment. In most instances, there was thorough investigation on the part of the company in advance of payment, and the company was in possession of considerable information concerning the matter:

1. Pacific Indemnity Company (XVII, 3275-3324).

2. Iowa National Mutual Insurance Company (Count VI).

3. State Farm Mutual Insurance Company (Counts IV and V).

4. Aetna Insurance Company (Counts IV and V).

5. Fireman's Fund Indemnity Company (Counts VII and VIII).

6. America Fore Loyalty Group (XVIII, 3536-3544).

7. Indiana Lumbermans Mutual Insurance Company (XIV, 2754-2778).

8. National Farmers' Union Property Casualty Company (XVII, 3324-3327).

9. Royal Indemnity Company (Count III).

10. Auto Club of Southern California (XIV, 2709-2727).

11. Commercial Insurance Company of Newark, New Jersey (Counts I and II).

Executives and Adjusters:

The following executives and adjusters for insurance companies handled or investigated the six collisions which were the subject of evidence herein. Most of them were men of considerable training and experience, holding responsible positions with their companies. Most of them were government witnesses. In cross-examination, Weinstein developed a mass of testimony as to the details and quantity of investigation that was conducted on the collisions in question. In three instances, the insurance company concerned referred the matter to the Index Bureau for further check (V, 999, Count VI; XIII, 2450, Count III; XIV, 2651, Counts VII and VIII). Nevertheless, these trained insurance investigators, looking at the claims from the adverse standpoint, despite all of the assistance they had and the facilities and experience at their disposal, still went ahead and paid the claims. Unfortunately, as Weinstein points out in Specification of Error No. VIII, supra, he was unable to properly assimilate or argue these important matters to the jury by reason of the drastically reduced time permitted for final argument.

The executives and adjusters are:

1. *Claude McLoud,* branch claims manager for the

Iowa National Mutual Insurance Company (V, 912-VI, 1009).

2. *Robert Perrin,* branch claims supervisor for Iowa National Mutual Insurance Company (VI, 1009-1029). There was a complete investigation by Crawford and Company, insurance adjusters, of the claims arising out of Count VI, (V, 998); the claims were referred to the Index Bureau (V, 999); depositions of all of the claimants were had (VI, 1003); all three claimants were medically examined by Dr. Paul Campbell, an orthopedist, examining for the insurance company (VI, 1004). Despite this, Perrin testified *there was nothing suspicious about the entire case; nothing unusual; everything appeared to be all right* (VI, 1018).

3. *James H. Minor,* claims manager, Fireman's Fund Insurance Company (XIII, 2553 - XIV, 2708). Minor handled the investigation of the collision set out in Counts VII and VIII himself; he was an old hand of 25-years' service (XIV, 2605-2606). He had medical reports on John Barnard, Page and Allison not only from two doctors of his own choosing, Dr. Short and Dr. Chauncey, who examined for the insurance company, but he also had a report from Dr. Joe Davis, Page's doctor, and from Dr. Campbell, John Barnard's doctor (XIV, 2633-2637); he checked on the claimants through a credit organization (XIV, 2614); he had the benefit of counsel with two leading insurance defense law firms in Portland (XIV, 2640-2642). *He saw nothing unusual about anything* (XIV, 2621).

4. *Ray Waterman,* claims manager, Pacific Indemn-

ity Company (XVII, 3275-3323). Waterman conducted a thorough investigation of the January 17, 1959, collision (XVII, 3313).

5. *Leo C. Lucas,* superintendent of claims for Loyalty Group Insurance, Counts I and II, (XIX, 3611-3623).

6. *Morris A. Dangott,* claims manager for Royal Globe Insurance Company (XII, 2223-2273; XIII, 2423-2456). Count III. Dangott conducted a very thorough investigation as shown by his testimony, even using a law graduate (XII, 2258).

7. *Crawford and Company* (Swett & Crawford). This company had branch offices all over the United States (V, 997). It investigated two of the collisions involved herein (V, 997; XIV, 2777).

8. *George Keith,* National Farmers Union Property Casualty Company (XVII, 3325-3327).

9. *John Pasley,* National Farmers Union Property Casualty Company (XVII, 3325-3327).

10. *Lawrence F. Kirkgasler,* staff adjuster, Pacific Indemnity Company (XVI, 3193-3197).

11. *Morton Kessler,* special agent, Indiana Lumberman's Mutual Insurance Company (XIV, 2754-2778).

12. *William H. Manspeaker,* claims representative, Auto Club of Southern California (XIV, 2709-2727).

Insurance Company Attorneys:

In each of the four cases in which Weinstein had

any connection, able and experienced defense counsel represented the involved insurance company. —On the other hand, the other two collisions (Counts I, II and III) were quickly settled and no attorney for any insurance company was ever involved. The attorneys involved were:

1. *William H. Morrison,* attorney with Maquire, Shields, Morrison, Bailey & Kester, Portland law firm. When Weinstein filed actions for the two Deegans and Saunders (Count VI), Morrison defended, along with attorney Thomas E. Cooney of his office (VI, 1001-1004).

2. *James K. Buell,* partner in the law firm of Phillips, Coughlin, Buell & Phillips, Portland. Buell defended the four actions brought by Rose and the three occupants of his car (Counts IV and V). The Rose case was tried, and the others settled. Buell's firm represents a number of insurance companies. Buell is a trial lawyer practicing since 1946. Buell was called as a witness for the government. Weinstein attempted to examine him as a character witness for Weinstein. The court refused to allow it. Buell would have been recalled as a witness for Weinstein if the court had not drastically curtailed the number of character witnesses Weinstein was allowed to call (VIII, 1496-1511).

3. *Wayne A. Williamson,* partner in the law firm of Mautz, Souther, Spaulding, Kinsey & Williamson, a large insurance defense firm in Portland (XIV, 2640). James Minor claims manager for Fireman's Fund consulted a great deal with Williamson concerning the

claims of John Barnard, Allison and Page (Counts VII and VIII; XIV, 2640). After Weinstein started actions for the three plaintiffs, and Williamson took depositions, he wrote Minor a letter and estimated the special damages that these three men would have. He ended his letter with the following:

> "A (Reading) 'Certainly it is well recognized that these are very dangerous cases and on a true value standpoint worth considerable money'." (XIV, 2650).

4. *George H. Fraser,* partner with the law firm of Hart, Rockwood, Davies, Biggs and Strayer, of Portland, a large firm that does considerable insurance defense work. By reason of a coverage question (Counts VII and VIII) it was necessary to get further representation from Fraser (XIV, 2642).

5. *Gordon Moore,* attorney with a large Portland firm, defended the insurance company on the three cases filed against George B. Wallace Company by Knippel, James Barnard and Kerr, arising out of the collision of January 17, 1959. The cases were all eventually settled (XVI, 3186-3192).

There is no evidence to indicate that any of these attorneys ever suspected there was anything wrong, and all of the claims were settled.

Automobile Owners:

In only two out of the six involved collisions were the owners of the striking cars at the wheel at the time of impact [Larry Haynes, (Count I; XIV, 2794)—Esther Howerton, (Count VI; IV, 755).] The other car

owners (all corporate) were apparently unaware of what was going on right up through the settlement of the case:

1. Singer Sewing Machine Company (Count III).

2. Howard Auto Supply (Count IV).

3. Wolfard Motor Company (Counts VII and VIII).

4. George B. Wallace Buick Company (Collision of 1-17-59).

Doctors:

The following doctors were involved in treating, or or examining for insurance companies, the various participants in the collisions. In no instance is there any evidence of suspicion on the part of any doctor. None of the reports indicate any irregularity, or suggestion that the patient was attempting to put something over on the doctor.

1. Dr. Gregg Wood (XXII, 4226-4272; Exs. 466, 468).

2. Dr. Howard Cherry (XXIII, 4486-4549; Exs. 148, 482-A,B.C, 483).

3. Dr. Joe Davis (XXII, 4380 - XXIII, 4483; Exs. 467, 469, 477-A and B, 478-A and B).

4. Dr. H. F. Fitch (XXIII, 4406; Ex. 479).

5. Dr. Edward Davis (X, 1828).

6. Dr. Arthur Jones (X, 1830; 4389).

7. Dr. W. Robert McMurray (X, 1830).

8. Dr. Paul Campbell (VI, 1004; XIV, 2633; XXIV, 4743; Ex. 490-A).

9. Dr. Edwin A. Mickel (X, 1832).

10. Dr. Lester Chauncey (XIV, 2636; Exs. 490-B, 491-B, 492-B).

11. Dr. F. A. Short (XIV, 2636; Exs. 491-A, 492-A).

12. Dr. John Dennis (X, 1833).

13. Dr. Francis Schuler (XVII, 3261).

14. Dr. R. A. Struthers (XXVII, 5312).

15. Dr. Kenneth Livingston (X, 1827, 1834).

16. Dr. J. A. Vickers (VI, 1059).

17. Dr. A. Puziss (XV, 2867; XVII, 3383).

18. Dr. Lester Eisendorf (X, 1957; XIII, 2452).

19. Dr. John Marxer (XVII, 3307-3310).

Hospitals:

A number of the participants were hospitalized or treated in the following hospitals. There is no indication of suspicion in any of the hospital records or on the part of the hospitals:

1. Providence Hospital (Exs. 471, 472, 473, 474, 475, 476—all hospital records).

2. Portland Sanitarium Hospital (XVII, 3261).

3. Physicians & Surgeons Hospital (XV, 2866; XVII, 3368; XVIII, 3404).

Court and Jury:

The lawsuit that Rose filed (Ex. 29) was tried in Multnomah County Circuit Court, resulting in a verdict for Rose after a week's trial (VIII, 1508).

All of the foregoing persons, organizations and institutions were fooled. Most of them were well-trained in their field. Many had financial interests antagonistic to the claimants. Weinstein, too, was fooled.

VI

All Persons Dealing with Weinstein, Even in An Adverse Capacity, Said He Was Fair and Honorable.

The trial involved much vindictiveness and bitterness. It is noteworthy that without exception, persons with whom Weinstein had dealt *on the very matters that were being litigated in this case,* who had been called as government witnesses, admitted on cross-examination that Weinstein had always dealt fairly with them. None of them testified to anything improper being done by Weinstein in connection with the case at issue.

Robert Perrin (Branch Claims Manager, Iowa National Mutual Insurance Co.):

Perrin was a star government witness, having been called to testify by the government on three different occasions. He exhibited great personal animosity toward Weinstein on his latter appearances as a witness.

Nevertheless, Perrin testified that Weinstein's word had always been good with him (VI, 1013); there was

nothing unusual in connection with the negotiations with Weinstein; nothing appeared suspicious in any way, or in connection with the entire matter (Count VI), (VI, 1018); although the usual method of settling a case was for the insurance company to send the release to plaintiff's attorney for execution and return prior to sending the drafts in payment of the claim, that with Weinstein, Perrin sent the releases *and* the drafts at the same time; he did it this way even though the other method had been suggested by his immediate superior; Perrin did this because he trusted Weinstein (VI, 1018-1022).

Perrin had been adjusting insurance casualty cases for about five years; he had "lots of dealings and negotiations with Mr. Weinstein" (VI, 1022, 1026); over the five-year period, Weinstein and Perrin had settled 30 to 40 cases; Perrin's dealings with Weinstein had always been satisfactory; Perrin had never known Weinstein to do anything underhanded in connection with his dealings with Perrin; Weinstein had always been open and above board with Perrin; Weinstein had one of the largest personal injury practices in Oregon (XVI, 3031-3034) .

The foregoing testimony on the part of Perrin is all the more remarkable upon the realization that there was probably no more hostile witness to appear against Weinstein than Perrin. On his second and third appearances, he was particularly so (XVI, 3002-3036; XXIX, 5601-5610; 5627-5655).

Weinstein feels the court erred in allowing Perrin to testify on both his second and third trips to the witness

stand. However, Weinstein is of the opinion that sufficient has been presented herein requiring reversal.

Ray Waterman (Claims manager, Pacific Indemnity Co.):

Waterman was a government witness. He investigated the collision of January 17, 1959. Concerning this he testified as follows on cross-examination:

"Q Your files there would indicate that case was quite thoroughly investigated, that is correct, is it, Mr. Waterman?
A We felt so.
Q And throughout the times that you have had dealings with the defendant, Philip Weinstein, have they always been satisfactory?
A Yes, sir.
Q Have you ever known him not to be open and above board with you?
A No, sir." (XVII, 3313)

The court sustained the government's objection to the last question.

Waterman testified that he "had a lot of dealings with Phil Weinstein—personal, by phone, and by letter and by various types of ways." (XVII, 3301).

James H. Minor (Claims Manager, Fireman's Fund Insurance Co.):

Minor had been with his company for 25 years. He personally handled the investigation of the collision resulting in Counts VII and VIII (XIV, 2605, 2606).

Minor handled the entire settlement of the Page-John Barnard-Allison cases; he testified there was nothing

done by Weinstein in connection with the settlement that was improper; that he had dealt with Weinstein on a number of occasions; these were cases involving personal injuries; Minor said that all of his relations in the past with Weinstein had been satisfactory; that he had never found him not to be open and above-board in his dealings with him (XIV, 2653, 2654).

James K. Buell (Attorney for insurance company, Counts IV and V):

Attorney Buell is a partner in the firm of Phillips, Coughlin, Buell & Phillips. He was called as a government witness. Weinstein attempted to examine Buell as to his dealings with Weinstein. The court sustained the government's objection. Buell would have been called back as a defense witness (VIII, 1510, 1511) had the court not drastically limited the number of Weinstein's character witnesses (XXVII, 5253).

Dr. Joe Davis (Outstanding Portland Orthopedist):

Dr. Davis was put upon, used and recommended by the persons who were setting up the collisions, in the same manner as Weinstein. (See Specification of Error No. I, supra 42-46).

Dr. Davis testified as follows concerning Weinstein:

"Q All right, as a practicing physician have you had either a correspondence or a telephone acquaintance with Mr. Weinstein?

A Yes, I have had, and reported to Mr. Weinstein on numerous occasions in the past over the years as a result of taking care of patients. One time, a long time ago, I know I

had a communication with Mr. Weinstein because he called me about a case that has been a number of years ago, longer than the period of time we are talking about now, but that is the only communication that I have ever had with him.

Q Has there ever been anything improper or underhanded in any way done by Mr. Weinstein in connection with your relationship with him?

A No." (XXII, 4392-4393)

All of the foregoing persons (excepting Dr. Davis) represented interests adverse to Weinstein and his clients.

Attention is invited to the fact that with Buell (Counts IV-V), Perrin (Count VI), Minor (Counts VII-VIII) and Waterman (Collision, January 17, 1959); each episode with which Weinstein had any connection was covered by the testimony of an individual most closely connected with the situation on the opposite side from Weinstein. This fact would appear to have considerable significance.

* * * * *

Weinstein called seven witnesses to testify in his behalf, as to his good character and reputation. At least five of them had business relationships with Weinstein in the past. All of the witnesses had the highest qualifications. All testified without hesitation as to Weinstein's reputation for truth, veracity, honesty and integrity—some in considerable detail on cross-examination. They were:

1. Honorable Alfred T. Sulmonetti, Circuit Court Judge, Fourth Judicial District, Multnomah County, Oregon (XXII, 4277-4284).

2. John Gordon Gearin, partner in law firm of Koerner, Young, McColloch & Dezendorf, Portland. Gearin is National Vice President of Federation of Insurance Counsel. The firm is attorney for the Southern Pacific Company and other large corporations and insurance companies (XXII, 4346-4356).

3. Harry Samuels, partner in the law firm of Vergeer & Samuels, Portland. One of the larger defense firms for insurance companies, such as State Farm Mutual Insurance Company (one of the insurance companies alleged in Counts IV and V), Western Casualty & Surety Company, Northwestern Casualty, most of the Farm Bureau insurance companies, and others (XXII, 4299-4310).

4. Pat Dooley, attorney with the firm of Phillips, Poole & Dooley. The firm business was principally the defense of personal injury accidents arising out of automobile collisions. Mr. Dooley was speaker of the Oregon House of Representatives in 1957 (XXII, 4290-4298).

5. B. B. Calvert, independent insurance adjuster in Portland, engaged in insurance adjusting since 1947; he was formerly with a number of the biggest insurance and adjusting companies (XXI, 4182-XXII, 4214).

6. Honorable J. J. Quillin, Presiding Judge of the Municipal Court of the City of Portland for 20 years; Municipal Court Judge for 24 years up to the present time. He has known Weinstein for 30

years, and Weinstein has appeared in his court frequently for 20 years (XXII, 4215-4223).

7. Captain Lyle R. Mariels, a Captain with the Portland Police Department, and with the department for 27 years. He has commanded every division of the police department except one. He has known Weinstein for at least 35 years (XXVII, 5215-5226).

Weinstein desired, offered to call, and named a number of other witnesses to testify. The court limited him to the above seven (XXI, 4188; XXII, 4205; XXVII, 5252-5254).

VII

The Conviction of Weinstein Was Obtained On the Testimony of Admitted Perjurers and Liars; Persons With Strong Reasons To Favor the Government in Their Testimony.

The chief witnesses against Weinstein were:

1. The Deegans
2. Boisjolie
3. Gordon McCoy
4. Rose
5. Swertfeger
6. Wooldridge
7. Perrin.

Leland Deegan (III, 435, 438, 475-478) and Geraldine Deegan (IV, 627, 643, 652, 657) were admitted perjurers. Gordon McCoy, Rose and Swertfeger all committed perjury in connection with the pending civil actions, and in

the trial of the case of Rose v. Swertfeger (Exs. 27, 29, 34-A, 50-A; VIII, 1468, 1470, 1508).

Of these, the two Deegans and Boisjolie were awaiting sentence on pleas of guilty to mail fraud and conspiracy. None of them were sentenced until February 7, 1962 (R. 231-233).

At the time he testified, Mr. Deegan was also out on bail (once set at $50,000) for intimidation of Boisjolie as a government witness, and he was in a status of awaiting trial (R. 249, 250).

Thus, all three of these people (the two Deegans and Boisjolie) had every reason to extend to the government the greatest cooperation and courtesy. For example,—Boisjolie traveled 200 miles from Portland to Bend, Oregon, and got intimidated by Deegan. [See comment of Judge Solomon on the occasion of Deegan's plea of guilty to the mail fraud charge (XXX, 6028, 6029).]

As for Gordon McCoy, Rose, Swertfeger and Wooldridge, all were named in the indictment as conspirators (Count IX). All could have been indicted at any time for mail fraud and conspiracy, as they well knew. All had reason to be attentive to the wishes of the government.

Leland Deegan finds it impossible to tell the truth. He even lied about his record. It is hard to understand why he bothered. On questioning, he admitted a Dyer Act conviction. He also admitted a conviction for petty larceny which he thought was reversed (III, 560)—Exhibits 503-A, B, C, D and E show five unreversed convictions for Deegan. (These should have been read to the jury had there been time.)

Those are the main witnesses against Weinstein. There were no others of any importance.

VIII

Weinstein Was the Prime Target Of the Government.

Deegan testified that when Postal Inspector Severtson interviewed him prior to the grand jury hearings in the fall of 1960, the following transpired:

"Q And didn't the Government inspector that talked to you before you testified before the grand jury tell you that you had your choice of sitting on one side of the table with those who testified against Mr. Weinstein, or that you had your choice of sitting with those who got indicted, isn't that what you told me up in Mr. Carskadon's office that day?

A Yes, something to that, yes, yes.

Q And isn't the man that told you that Mr. Severtson, who is sitting there at counsel table (indicating)?

A That is correct.

Q And you were indicted, weren't you?

A I was indicted."

* * * *

"MR. DWIGHT SCHWAB: (Q) You did not testify against Mr. Weinstein at the grand jury, did you?

A I didn't testify against nobody, no.

Q You did not testify against Mr. Weinstein, did you?

A No." (III, 475, 476)

This remarkable admission was not denied by Severtson.

Postal Inspector Severtson was a witness at the trial, and was in attendance at counsel table throughout the entire trial.

Anna L. Kimmel was named as a conspirator (Count IX). At the time she testified her name was Anna Kimmel Stewart. She was a passenger in the car driven by defendant DePlois at the time of the collision (Count III). She settled her claim for $5,500 (Ex. 67). She was called as a government witness. On cross-examination, Mrs. Stewart testified as follows:

"Q Mrs. Stewart, your attorney was not Philip Weinstein, was it?
A No, sir.
Q Can you tell me what building your attorney was in, do you recall the Executive Building?
A Yes, that new building.
Q That new building up around Sixth and Yamhill?
A That is right.
Q And you had no dealings whatsoever with Philip Weinstein?
A I don't even know the joker, so *they keep asking if I know him, I don't even know him.*
Q You are speaking of my client.
A Well, I am sorry if I am, that is your problem.

* * * *

"MR. DWIGHT SCHWAB: (Q) I would like one more question: *Who keeps asking you about Philip Weinstein? You said they keeping asking you about him, you mean Mr. Severtson here?*
A *I was asked once by him, yes, and I was asked by different people that questioned me.*
Q *You mean, these police officers, and so on, that questioned you?*
A *Yes.*
Q Have they done that over a period of a long time, many months?
A When they first took me in to question me.
Q And since?
A No.
Q Just when they first took you in to question

you, and they were quite interested in Philip Weinstein, were they?

A I don't know, I don't know nothing about them, I can't tell you nothing." (X, 1960, 1961) (Emphasis added.)

IX

Weinstein Processed and Handled the Staged Collision Cases the Same as He Handled All of the Rest of His Cases— He Had a Tremendous Volume of Business.

Weinstein had one of the biggest personal injury practices in Oregon (VIII, 1521; XVI, 3033, 3034; XXIII, 4585). Weinstein prepared a compilation of all personal injury cases coming into his office during the period of July 1, 1958 to March 1, 1959 (Ex. 499). This was about a month before to a month after the four collisions herein in which Weinstein had some connection. Exclusive of any cases involved here, Exhibit 499 shows he took in 106 new cases during that eight-month period. Those cases grossed eventually over $250,000; Weinstein's fees thereon were about $64,000 for the eight months (XXV, 4885-4897).

In addition, other matters also came into his office (XXV, 4898).

Weinstein was so busy that he referred much business to other lawyers (XXV, 4864, 4865, 4898; XXVI, 5172).

Exhibit 499 lists the 106 cases by name. The honesty of none was challenged by the government.

Weinstein testified in detail concerning how he han-

dled the cases herein (XXIV, 4681-4885). Two of them he sent to attorney Ben Gray (Counts IV and V; XXIV, 4719; Collision of January 17, 1959; XVII, 3225).

Attorneys John Ryan and Nels Peterson testified in detail as to how the average practitioner in the Portland area handling personal injury cases would go about his work (XXIV, 4610; XXV, 4900). Weinstein handled the two cases he retained (Counts VI and VII-VIII) generally in conformance therewith.

Considering the volume of cases and work that he had, *it is absolutely inconceivable that Weinstein, a highly successful practitioner, would have stooped to planned collisions*. It would serve him no earthly purpose!

It is much more reasonable to conclude that Weinstein was fooled and put upon [and irretrievably damaged!] in much the same manner as the insurance companies, adjusters, attorneys, doctors, hospitals and others were fooled and put upon. There is no other logical explanation.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DWIGHT L. SCHWAB,
Of Attorneys for Appellant
Philip Weinstein.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE JAMES BARNARD, et al, Appellants v. UNITED STATES OF AMERICA Appellee	NO. 17746

CONSOLIDATED BRIEF OF APPELLEE

SIDNEY I. LEZAK
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District of Oregon

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE JAMES BARNARD, et al, Appellants v. UNITED STATES OF AMERICA Appellee	NO. 17746

CONSOLIDATED BRIEF OF APPELLEE

JURISDICTION

These are five (5) timely appeals from respective judgments of conviction following trial upon an indictment for violations of Title 18 U.S.C. Section 1341 (Mail Fraud) and Title 18 U.S.C. Section 371 (Conspiracy) entered in the United States District Court for the District of Oregon.

Jurisdiction of the District Court was invoked under Title 18 U.S.C. Section 3231 and jurisdiction on appeal has been invoked under Title 28 U.S.C. Section 1291.

EXPLANATORY NOTE REGARDING REFERENCES TO TRANSCRIPT OR EXHIBITS

In light of the many references to a voluminous transcript and numerous exhibits required in support of Appellee's Statement of the Case and Argument, appellee has collected the majority of such references in an Appendix to this Brief.

The Appendix is keyed to the Statement of the Case and Argument by reference number, e.g., 1,2,3,4,etc. The appropriate reference number appears where transcript references would ordinarily appear.

Upon locating the appropriate reference number in the Appendix, the reader is provided with the collected transcript and exhibit references pertaining to the facts set forth in either the Statement of the Case or Argument.

Since there is a Transcript of Record (3 volumes), a Supplemental Transcript of Record (2 volumes), a Second Supplemental Transcript of Record, and a Supplemental Transcript of Record containing Transcript of Hearing after Remand, and since the pagination is not consecutive throughout, the following abbreviations will be employed where appropriate: Record - RI, RII, RIII, followed by page number and line; Supplemental Record - Supp. RI,

Supp. RII, followed by page number and line; Second Supplemental Record - 2 Supp.R, followed by page number and line; Supplemental Record, Transcript of Hearing after Remand - Tr. Hrg., followed by page number and line.

STATEMENT OF THE CASE

Appellant Philip Weinstein was found guilty by a jury on all counts charged in the indictment, viz: Counts VI, VII and VIII (Mail Fraud) and Count IX (Conspiracy).

Appellant George James Barnard was found guilty by a jury on seven of the nine counts charged in the indictment, viz: Counts I, II, III, IV, V, VI (Mail Fraud) and Count IX (Conspiracy).

Appellant Raymond Henry Knippel was found guilty by a jury on both counts charged in the indictment, viz: Count III (Mail Fraud) and Count IX (Conspiracy).

Appellant William Mack Lassiter was found guilty by a jury on both counts charged in the indictment, viz: Count III (Mail Fraud) and Count IX (Conspiracy).

Appellant John Norris Barnard was found guilty by a jury on all counts charged in the indictment, viz: Counts VII and VIII (Mail Fraud) and Count IX (Conspiracy).

The basis of the conspiracy, and the substantive charges of Mail Fraud, appears from a series of staged collisions in Portland, Oregon, and the subsequent assertion of

claims for personal injury and property damage in order to obtain money from insurance companies upon the representation that the collisions had occurred through the negligence of another and without fault on the part of the claimants. The conspiracy began in 1958.

The indictment was in nine counts, eight of Mail Fraud, (Counts I through VIII inclusive), and one of Conspiracy, (Count IX). (RI,1) At the trial testimony was adduced with respect to six collisions, of which five were the basis for the substantive counts, that took place on the following dates: August 18, 1958, (Counts VII, VIII); September 11, 1958, (Count VI); October 16, 1958, (Counts IV, V); January 17, 1959; September 5, 1959, (Count III); and February 16, 1960, (Counts I, II).

From the following facts developed at trial, the nature, extent and duration of the scheme are apparent. They have been set forth, so far as possible, in chronological fashion in order that the pattern of conduct be more readily discerned.

Charles Giegerich, a close friend of George Barnard, was brought up from California to participate in a staged collision. [1] He went to work for Wolfard Motor Co. on August 16, 1958, and on August 18, 1958, he struck another vehicle from the rear while driving his employer's car, the basis for Counts VII and VIII.[2] The other vehicle was driven

by Ronald Allison.[3] The investigating officer ascertained that the point of impact was 40 feet back from the intersection and that the Allison vehicle moved only 13 feet after the impact.[4] Allison had no explanation other than to say he was waiting in that position for a red light, although there was no vehicle in front of him.[5] The investigating officer also found "a friendliness amongst the participants which is lacking in the normal accident," and observed that the steering wheel was bent down, that is, forward from the driver's position and pushed down so that the wheel was no longer circular.[6] Allison told the investigating officer that his chest hurt and the steering wheel had been pushed down as a result of the collision.[7] At the hospital he reported that he had hit himself on the steering wheel and that his chest ached slightly; however, upon initial examination his chest was found to be perfectly normal.[8] The examining doctor testified that he would not expect to find such a lack of physical evidence in a patient who had come into contact with the steering wheel following a rear-end collision sufficiently sharp to break the steering wheel.[9]

In applying for an Oregon driver's license, Giegerich gave as his residence address 334 S.E. Grand Avenue, which was in fact the business address of Tonkin Motors.[10] At the scene of the collision Giegerich gave his residence address as 12536 S.E. Lincoln Court to the investigating officer, as he had done for employment records at Wolford Motor Co. [11]

This was the home of a Mrs. Denny at which Giegerich had never stayed, although he did park his car there, with the assistance of George Barnard who later came and got the car for Giegerich.[12] On his admission to the hospital following the collision Giegerich stated his residence address as 12536 S.E. Lincoln Court, although the typed record showed his address as 125 S.E. Lincoln.[13] The latter was a vacant lot.[14] In talking with an adjuster for the insurance company investigating the collision he gave his residence address as 1633 S.E. Hawthorne, yet this was the business address of a print shop.[15] Giegerich at first reported that he had an accident while on his way home, but later stated that it occurred while he was on business for his employer.[16]

John Barnard, George Barnard's brother, was a passenger in the Allison vehicle, and on two earlier occasions had been a client of Weinstein.[17] In both these instances, John Barnard asserted a claim by reason of personal injuries sustained while in the employ of Ross Island Sand & Gravel Co.[18] It was there that he had met Allison and the two had become close friends.[19] The latter of the two cases had been finally concluded May 1, 1958.[20]

While Weinstein undertook the representation of John Barnard, as well as that of Allison and Page (the other passengers in the Allison vehicle), he did not do so until several days after August 20, 1958.[21] Prior to assuming that

representation Weinstein issued to John Barnard five, and perhaps seven checks, four of which were executed even before the collision occurred.[22] It was not the standard practice among attorneys in the Portland area to advance monies to clients before they became clients.[23]

These were the first of a long series issued to John Barnard during the pendency of his claims by Weinstein, who also issued a series of checks to Allison.[24]

Weinstein filed complaints against Giegerich on behalf of Allison, John Barnard and James Page and served them by mail upon the Motor Vehicle Department for the State of Oregon; and also forwarded a copy of the Summons and Complaint by registered mail to Giegerich at his home address in Santa Fe Springs, California, the address at which George Barnard was accustomed to visit and at which he received funds via Western Union on June 3, 1960.[25] All three law suits were settled in October 1959.[26]

George Barnard had for some time attempted to get Esther Howerton to participate in a staged collision and, although unsuccessful during the earlier period with Giegerich, finally succeeded with the help of David Boisjolie.[27] George Barnard convinced Sonny Deegan to participate in the same staged collision by assuring him that others, in "prior phony accidents" had made large recoveries and there was no danger of being caught.[28] The collision was set up for and

took place on September 11, 1958, and was the basis for substantive Count VI.

On July 9, 1958, George Barnard, using the name James Barnard, purchased a 1941 Chevrolet (Oregon License 2G6777) from Field's Chevrolet.[29] On August 16, 1958, Weinstein issued a check to George Barnard in the sum of $100 and George, (who was in the habit of buying many old cars per year - in 1955 and 1956 he averaged ten per year from Field Chevrolet alone), on August 21, 1958, purchased a 1951 Oldsmobile (Oregon License 3B5834), again from Field's Chevrolet, paying $100.[30] He then gave the Oldsmobile to Howerton and told her to obtain $40,000 insurance coverage, for which he provided the money and which was obtained on September 5, 1958.[31]

On September 11, 1958, a 1951 Oldsmobile (Oregon License 3B5834) struck a 1941 Chevrolet (Oregon License 2G6777) from the rear in a collision that four of the five participants testified was planned with George Barnard.[32] The Oldsmobile was driven by Boisjolie but contained Howerton as the passenger who was to become the putative driver.[33] The Chevrolet, which Deegan acquired from George Barnard, was driven by Mrs. Deegan and contained Deegan and Darrell Saunders as passengers.[34] Immediately following the impact, Boisjolie slipped out from behind the wheel and went to join George Barnard, who was waiting at the scene, and Howerton slid over into the driver's position.[35]

The morning after the collision, the Deegans met with George Barnard who told them to go see Weinstein as the attorney with whom everything had been prearranged, (although Weinstein later told Deegan to say that he had been referred by an Irene Blair).[36] Deegan then went to see Weinstein at his office and gave him the details of the collision.[37] Later the same day Deegan saw Weinstein at Providence Hospital,to which the participants had been removed after the collision, and first met him in Saunders' room where he saw Weinstein give Saunders "two or three hundred dollar bills."[38] Shortly thereafter, Deegan again met Weinstein in the hospital parking lot where he showed Weinstein the Chevrolet used in the collision and was advised by Weinstein that since it was undamaged he should bash it into a tree, which he did with the aid of George Barnard.[39] The next day Deegan visited Weinstein's office, told Weinstein he had mashed the car up, and was advised by him to get rid of the car, for photographs taken at the scene revealed that it had not been damaged in the collision.[40]

Neither of the Deegans nor Saunders were injured in the collision but were told by Weinstein how they should perform so as to indicate that they had been.[41] After a visit to the doctor on one occasion Mrs. Deegan was asked how the visit went by Weinstein and she replied "I thought I did as I was told" and Weinstein made no reply.[42] Weinstein also made many advances of money to the Deegans, as well as to Saunders, during the time their cases were pending.[43]

Weinstein filed complaints on behalf of both the Deegans and Saunders, served them by mail on the Motor Vehicle Department for the State of Oregon, and eventually settled all three.[44] It was George Barnard, however, who came to the Deegans' home to tell them their settlement check had arrived.[45] After settling accounts with Weinstein the Deegans had $840, of which $800 was paid to George Barnard, who was waiting for them in a restaurant across the street from Weinstein's office, George having earlier paid the Deegans $500 for their share of the proceeds.[46]

After Weinstein filed the action for Saunders, but before settlement, Weinstein purportedly obtained a general power of attorney from Saunders, (which was not acknowledged), before the latter left the Portland area.[47] At the time Saunders' case was settled Weinstein signed Saunders' name to the check and release, (including witnessing that Saunders had signed in his presence, although he was not in fact there), as closely as he could to the manner in which Saunders would sign.[48] While Weinstein testified that Perrin, the insurance adjuster, knew that Saunders was not in Portland and that he knew of the power of attorney, Perrin flatly denied this.[49] If the insurance company had known that Saunders was not the actual signee of the release, or endorser of the check, it would have required a certified copy of the power of attorney.[50]

Boisjolie, the actual driver of the car which rear-ended the Deegan car on September 11, 1958, was employed by Howard Auto Supply Co. during 1958, and one of his fellow employees was a Lewis Swertfeger, aka Scott.[51] George Barnard attempted to get Boisjolie to participate again, but the latter refused and instead made arrangements for Scott, (as he was then known), to meet with George Barnard, who outlined the plan for another staged collision.[52] George Barnard convinced Scott to participate and on October 16, 1958, Scott drove a Howard Auto Supply Co. vehicle which struck, from the rear, a vehicle driven by Keith Rose, in accordance with the plan outlined by George Barnard assisted by Raymond Knippel.[53]

Boisjolie also recruited Keith Rose, made arrangements for him to meet George Barnard and, assisted by George Barnard outlined the plan.[54] In soliciting the participation of Rose, Boisjolie told him that "we got it set up, a syndicate set up" and explained that these were rear-end collisions in which the persons involved would claim back injuries and "split fifty-fifty with the syndicate when they got a settlement."[55]

Saunders, the passenger in the Deegan car on September 11, 1958, also met with Boisjolie and Rose, talked of "other instances," (as had Boisjolie earlier), and assured Rose that he would see to it that Rose made the performance.[56] It was the same Saunders who recruited Gordon McCoy as a passenger for the Rose vehicle, after relating the phoniness of the

earlier collision, and arranged for his meeting with George Barnard.[57] It was also Saunders who brought McCoy and Dennis Dunham, (another passenger in the Rose vehicle), to the Rose vehicle prior to the collision and who advised that George Barnard would be at the scene to see that things went right; and George was there.[58] The collision, which three of the five actors identified as staged, occurred as planned on October 16, 1958, and was the basis for substantive Counts IV and V.[59]

For his participation Scott received $500 from George Barnard, at least $300 of which was paid to Scott on October 17, 1958.[60] In October of 1958, some time after the 17th, George Barnard went to Weinstein's office and obtained money in excess of $100.[61]

While planning the collision and recruiting the personnel therefor, George Barnard had told Scott, Rose and McCoy that the lawyer to handle the claims had been "lined up" and that his name was Phil Weinstein, and handed McCoy one of Weinstein's business cards and that of the Orthopedic and Fracture Clinic.[62] Upon arrival at the hospital following the collision McCoy arranged, through a nurse, to call Weinstein, handing her the card George Barnard had given him.[63] However, when Weinstein arrived at the hospital he told McCoy that he was the attorney for Rose, having been contacted by an in-law or friend of Rose, and asked McCoy if he would like

an attorney.[64] Yet Weinstein, upon visiting Rose at the hospital, said "he was representing the other boys" and asked Rose if he wished representation.[65] Later Weinstein told Rose, as well as McCoy, to say that a Bob Svilar had sent Rose and McCoy to Weinstein.[66]

Saunders, who had earlier explained to the actors how to behave upon arrival at the hospital, came to visit both Rose and McCoy at the hospital, immediately after the collision, told Rose to keep quiet, that all was well and advised McCoy to speak only to Weinstein.[67]

A month or six weeks after accepting the cases of Rose and McCoy, Weinstein referred them to Ben Gray, his associate who occupied the same office.[68] Weinstein made four or five advances of money to Rose before the referral, and he continued to advance funds to Rose after the referral.[69] He also advanced sums to McCoy, both before and after the referral to Gray, Gray having told McCoy to see Weinstein for money.[70] Before referring McCoy and Rose to Gray, Weinstein told Rose that there was "some talk of this accident being a phony or a fixed accident."[71]

Actions were filed and claims asserted, by Gray on behalf of Rose and all his passengers and the Rose action was actually brought to trial.[72] During the trial Scott met with George Barnard, his brother John, (a passenger in the collision of August 18, 1958), and Boisjolie.[73] At this

meeting, George Barnard told Scott what to say at the trial and also that "if anybody should start to talk or open their mouths or get carried away" that he might have to use a revolver to keep them quiet.[74]

On September 23, 1959, the day the jury was deliberating in the Rose and Scott actions, George Barnard met with Scott, Boisjolie and Knippel, told them that Knippel and Scott were to collect his share of the money received from the judgment and said they were to wait for Rose to get his check, (they would know the check was there because "the lawyer would call"), then take him down and cash the check.[75]

Aetna Insurance Company paid Rose, as a result of the judgment; as did State Farm Insurance Company, for the same staged collision, and both companies settled with McCoy.[76]

Deegan first met Knippel about three months after the collision of September 11, 1958, when George Barnard introduced them at the Clock restaurant, and at that time he overheard George and Knippel discussing a collision which was in the planning stage.[77] Howerton, the owner of the other car involved in the September 11th collision, introduced Conrad Kerr to George Barnard, who in turn introduced Kerr to Knippel and a James Barnard.[78] (a)

(a) Although Kerr denies that the collision was planned, and asserts that he first met Knippel and James Barnard the day of the collision, the testimony of Deegan, (characterized by the trial court as "obviously . . . . a

Kerr drove a car, in which Knippel and James Barnard rode as passengers, that was struck from the rear on January 17, 1959, in the collision earlier forecast at the Clock.[80] Kerr's vehicle was struck by an automobile driven by Alfred Wooldrige, (although owned by George Wallace Buick Company), and insured by Pacific Indemnity Company, which company settled the claims asserted by Kerr, Knippel and James Barnard in the actions filed January 17, 1959; as National Farmer's Union Property and Casualty Company, which insured Kerr, paid out on the claims asserted by Kerr and Knippel following this same collision.[81]

Wooldrige, who met Weinstein before he did George Barnard when he retained Weinstein to represent him concerning an earlier and apparently accidental collision, was approached by George Barnard to participate in a staged collision and directed by George Barnard to select a car from a big car dealer that would have sufficient insurance coverage "to handle the deal."[82] On January 17, 1959, Wooldrige received final instructions from George Barnard and Knippel

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reluctant witness"), and that of the investigating officer, (Walker), indicates that Kerr was mistaken in each instance - a conclusion supported, in part at least, by Kerr's own statements. The reasonable conclusion from the combined testimony of Kerr and Deegan (each a Government witness), is that Howerton introduced Kerr to George Barnard late in November 1958 and that shortly thereafter George Barnard introduced Kerr to Knippel. Deegan apparently sat in on a meeting at the Clock restaurant late in November 1958 at which George Barnard, Knippel and Kerr, having already met, discussed the forthcoming collision. 79/

detailing the manner in which the collision was to occur and identifying the other vehicle to be involved.[83] George Barnard again was at the scene of the staged collision and issued instructions as to post-collision performance.[84]

After the collision Kerr and Knippel first contacted Weinstein for representation, but Weinstein referred them to his associate, Gray, who filed actions on their behalf, and on behalf of James Barnard.[85] Weinstein made the referral to his associate, with whom he split the attorney's fee, because he was already representing Wooldrige on another matter, nevertheless, Gray never advanced any monies to Kerr but instead sent Kerr to Weinstein.[86] The only times that Kerr saw Weinstein was when he went to receive money, (on some four or five visits to Weinstein he received $1100 which was deducted from the recovery upon settlement of the case), and Knippel, too, received money from Weinstein during this period.[87]

Shortly after the collision, (although there is a conflict in Wooldrige's testimony in this regard, it would appear to be after March 23 and before March 30, 1959), Wooldrige left Portland, Oregon, and proceeded to Council Bluffs, Iowa, (via Cheyenne, Wyoming), arriving in April 1959 and not returning to Portland until the time of trial.[88] George Barnard, who had paid Wooldrige $75 to $100 prior to

the collision, gave Wooldrige the car by which he left town following the collision, although George Barnard tried to talk him into participating in another one before he left.[89]

Wooldrige took with him to Council Bluffs a Jackie Havel, whose mother, a Vancouver-Washington policewoman, subsequently learned of Wooldrige's whereabouts from a letter her daughter sent from Council Bluffs on May 5, 1959.[90] While enroute to Council Bluffs, Wooldrige stopped at the Holiday Motel in Cheyenne and called Weinstein, (George Barnard had no telephone), and on March 30, 1959, received $50 by Western Union in response to his request therefor.[91] This was the last of several occasions upon which Wooldrige had obtained money from Weinstein, and while the amounts, (some $205 in addition to the $50 Western Union money order sent to Cheyenne), Wooldrige had received were supposed to be deducted from a settlement of the earlier "legitimate accident," Weinstein had told Wooldrige, on the occasion of his last visit to Weinstein's office before leaving Portland, that he "didn't have much of a case" and that Wooldrige would not "have a very good chance."[92] Wooldrige never contacted Weinstein, or anyone else in Portland, after leaving Cheyenne and up to the time of trial had not repaid Weinstein any money.[93]

In March 1959, Wooldrige, in endorsing one of the checks which Weinstein had written to him, placed thereon the address 8828 North Dwight. (Ex. 443C) Some time in October 1959, Knippel appeared at that address, asked for Wooldrige, and was told that Wooldrige's whereabouts was not known but that he had been going with a "Jackie" whose mother worked on the Vancouver Police force.[94]

Mrs. Havel received an inquiry from Knippel, "along the first part of November" 1959, concerning the whereabouts of Wooldrige, and after that, ("oh it must have been two or three months later"), received a telephone inquiry from a gentleman who said he was an attorney, "Mr. Weinstein of Weinstein & Gray."[95] Mrs. Havel told the party who phoned that Wooldrige was living in Council Bluffs, Iowa.[96] On April 5, 1959, Mr. Mautz, the attorney who originally handled the defense of Wooldrige, sent a letter to him c/o Weinstein in which he stated that there was a serious question whether or not "you have not violated and repudiated any such coverage by your failure to comply with conditions of insurance policy,"[97] and Gray was later advised that the carrier was going to refuse the defense of Wooldrige for failure to cooperate in that all efforts to locate him had proven fruitless. At the time of trial, during the cross-examination of the Government's witness Moore, who succeeded Mautz as the attorney handling the Wooldrige defense, Weinstein produced

both the letter, and the opened envelope in which it had come to his office.[98] On December 16, 1959, Weinstein wrote Moore advising him of Wooldrige's address and Moore was then, for the first time, able to communicate with Wooldrige.[99]

Mr. Waterman, claims manager for Pacific Indemnity, handled the claims of Kerr, Knippel and James Barnard made pursuant to the collision of January 17, 1959, and during the course of his handling the claims he also attempted to ascertain Wooldrige's address from Weinstein, who stated that he would advise Waterman when he learned Wooldrige's address.[100] Weinstein at first advised Waterman that he did not know of Wooldrige's whereabouts, then, on April 9, 1959, told Waterman that Wooldrige was in Idaho but would return.[101]

Anna Kimmel [b] lived with Patricia DePlois and it was at the latter's home where Kimmel first met Knippel, (the passenger in the collision of January 17), and George Barnard on the evening of September 5, 1959, when the collision planned for that night was discussed.[102] From the DePlois home Kimmel, George Barnard, DePlois and Knippel went first to Scotty's restaurant, where they were joined by William Mack Lassiter, (a close friend of Knippel), and then to the Nabisco Company.[103] The five stayed at the

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[b] At the time of trial she had married and her testimony appears under the name of Stewart.(RIII 1893/6-12)

Nabisco plant long enough for George Barnard to explain the details of the forthcoming collision and take them to the contemplated scene.[104] After returning to Nabisco the five returned to Scotty's where George Barnard told Knippel and Lassiter to break the front seat of the DePlois vehicle.[105] Knippel and Lassiter took the DePlois car away and when they returned with it the front seat was broken back in such a fashion that Kimmel, sitting in it, could not see out the front windshield as she and DePlois proceeded to 32d and Dekum to participate in the collision.[106]

Donald Johnstone sold a sewing machine to Lassiter's wife on July 11, 1959 and some time thereafter, but no later than July 25, 1959, a close enough relationship between Lassiter and Johnstone developed to result in their discussing the buying of a boat, calling every day or two, and, 20 days after the collision, the formation of a small corporation of which Johnstone and Lassiter were two of the three incorporators and initial directors.[107] On September 5, 1959, Johnstone drove a Singer Sewing Machine Company truck into the rear end of the DePlois vehicle, (driven by DePlois and containing Kimmel as a passenger), under circumstances that both investigating officers and a nearby resident found peculiar.[108] As in the collision of August 18, 1958, the target car had not gone to the intersection where a normal car would stop, and Johnstone missed the DePlois vehicle at first, backed up,

and then hit it from the rear.[109] This collision was the basis for substantive Count III. John Barnard, George's brother, (and the passenger in the collision of August 18, 1958), was at the scene, as he had been at others.[110]

Singer Sewing Machine Company was insured by Royal Indemnity Company and that company received claims from both DePlois and Kimmel as a result of the September 5 collision, through attorney Herbert Black.[111] Black had come to work for Weinstein in 1957, after working as a claims examiner for Allstate Insurance Company, and shared offices with Weinstein, at least until mid-July 1959, where George Barnard, who visited the office once a week during the period December 1958 through July 1959, would sometimes see Black, although he would usually ask for Weinstein.[112] It was also Black who initiated the transference of funds to George Barnard at the Giegerich residence at Santa Fe Springs on June 3, 1960.[113]

Both the DePlois and Kimmel claims were settled, in the amount of $6100 for DePlois and $5500 for Kimmel.[114] Of the $5500, Kimmel got $2000, gave $1000 of it to George Barnard, and then went to a bank in St. John with George Barnard and DePlois where both she and DePlois deposited $800.[115]

Allison, the driver of the target car in the collision of August 18, 1958, had known Larry Haynes for some time

prior to January, 1960, when Allison opened the service station at which Haynes was employed.[116] After the station opened George Barnard was there "at least once a night", and it was there that Allison introduced Haynes to George about two to three weeks before the collision of February 16, 1960, (the basis for substantive Counts I and II).[117]

About February 12, 1960, George Barnard met with Allison and Haynes at Allison's service station and George promised Haynes $50 as a down payment on the collision, with more to come afterwards, and later left $50 with Allison to give to Haynes.[118] On February 16, 1960, about two hours before the collision occurred, Haynes discussed the collision with George at Allison's service station, and from there proceeded with George to a meeting with the other participants immediately prior to the collision.[119] At this latter meeting George Barnard talked with Arthur Smith, Richard Sanseri and Don McCoy, discussed the collision with them, and gave them instructions as to how they were to proceed.[120] At that time, under George Barnard's instructions Smith, McCoy and George broke down the front seat of Sanseri's demonstrator, which Smith was driving.[121] After breaking down the seat, another rear end collision was staged with Haynes, (having had the target pointed out by George Barnard, and under instructions from him to "hit him hard and make it pay"), driving into the rear of the car driven by Smith and

containing Sanseri and D. McCoy as passengers.[122]

Smith first met George Barnard at Gardner Ford, where Smith was Assistant Used Car Manager, in November or December of 1958 and shortly thereafter had discussed the staging of a collision with George Barnard and Eugene Miller,[c] which plan was subsequently abandoned.[124] George Barnard was a frequent purchaser of automobiles from Gardner Ford, (as in earlier years he had been with Fields Chevrolet from whom he had bought both the Deegan and Howerton vehicles).[125]

Smith and George Barnard had almost daily discussions about the proposed collision, and Smith, who had known D. McCoy since July 1959, introduced him to Sanseri, a co-worker at Gardner Ford, and solicited their participation by telling them that there had been staged or planned wrecks in the Portland area and that there was no danger of any trouble after.[126]

George Barnard was at the scene of the collision criticizing Haynes and directing Smith, who was not in fact hurt in the collision, as to his post-accident performance.[127] Two days before he had told Haynes to get as much insurance on his car as he could for $25, and gave Haynes the money with which to purchase it.[128] At the meeting just before the

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[c] A former acquaintance of Giegerich, the driver of the weapons car which hit that of Allison, and an old acquaintance of John Barnard, the passenger in Allison's car.[123]

collision George Barnard told Smith, Sanseri and D. McCoy to go to Physicians & Surgeons Hospital, ask for Dr. Puziss and that an attorney would be at the hospital shortly after they arrived; and, although he requested to be taken to Portland Sanitarium, Sanseri was taken to Physicians and Surgeons Hospital anyway.[129] Alan Ruben, an attorney associated with Black, (the attorney who represented DePlois and Kimmel), apparently arrived at the hospital within an hour or two after Smith, Sanseri and D. McCoy arrived, and could have been awaiting them.[130] Smith had told Sanseri earlier that everything was set up, including the doctor and the lawyer.[131] Sanseri felt the doctor was fixed, but the only indication he had that the lawyer knew the collision was staged was the fact that he arrived at the hospital so soon following the accident.[132]

Sanseri, Smith and D. McCoy, through Ruben, each asserted a claim against the carrier covering the Haynes vehicle, and all three claims were settled; Smith receiving $2500, Sanseri $2250, and D. McCoy $1350.[133]

Of the $2500 settlement Smith received a net, after attorney's fees and expenses, of approximately $1100, and, in satisfaction of an earlier arrangement with George Barnard whereby the latter was to receive 1/3 of his net recovery, Smith issued a check to George on March 14, 1960, in the amount of $482.[134] Even though George Barnard was aware

that the instrument was drawn against insufficient funds, he nevertheless negotiated it by placing a deposit of $100 against a washer and dryer and receiving $382 in cash.[135] Later, George Barnard demanded another $25 of Smith and sent his brother John, (the passenger in the Giegerich-Allison accident), around to collect it.[136]

Sanseri received a net of approximately $1200 from the $2250 settlement,and George Barnard called to get his percentage before Sanseri had deposited the settlement check and before Sanseri had told anyone he had received it.[137] After the call Sanseri wrote a check to George Barnard, which the latter cashed, in the amount of $600.[138] D. McCoy netted $700 from his $1350 settlement, but shared the proceeds with no one; although George Barnard tried to collect some money from D. McCoy at least through July 1960.[139] d/

In August or September 1960, right after investigators interviewed the Deegans, (the investigation which led ultimately to the indictment began April 5, 1960), George Barnard came to the Deegan home and told Mrs. Deegan not to worry, to keep her mouth shut, and to continue telling the stories she had been telling.[140] Deegan went to Weinstein, told him that the investigators had talked about staged accidents and that he was worried that Mrs. Deegan would talk.[141]

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d/ The testimony concerning the efforts to collect from D. McCoy was admitted only as against George Barnard, under an instruction from the Court, and then only as probative of scienter. (RIII 3430/16-24)

Weinstein assured him that there was no reason to worry, that "they were just fishing", but suggested he get Mrs. Deegan out of town, and gave Deegan the money to do so.[142] During this same period Knippel was trying to arrange still another staged accident, as he and Lassiter had attempted to do earlier in March 1960.[143]

On October 10, 1960, the investigators met Boisjolie at work at about 6 PM and took him from there to their office to interrogate him, but before leaving with them Boisjolie asked his wife to call Weinstein "and see what he could do for him."[144] Mrs. Boisjolie called Weinstein, who told her to have Boisjolie call him when the latter got home, and then herself went home, where Knippel and Lassiter appeared at about 11:30 PM (they had been frequently together during this period and in the preceding weeks constantly warning Boisjolie against talking), and told her to tell her husband to keep his mouth shut, that it would be best to leave town.[145] On being advised that the investigating officers were bringing Boisjolie home Knippel and Lassiter left, but returned at 5:30 AM the following morning to advise Boisjolie that they were leaving town and that Boisjolie should get some money from Weinstein and do the same.[146]

On October 19, 1960, Perrin, (the insurance adjuster who had handled the Deegan and Saunders claims for the insurance company and who had had many dealings with Weinstein),

met Weinstein on the street and Weinstein said: "I am not an attorney, I am just a banker, you never saw a banker go to jail, did you? They will never get me. They will get some of the small fry in this matter, but they will never get me."[147] During this same month, (October 23 or 25), Lassiter was explaining to Boisjolie that anyone who "squealed or goofed" would be fixed.[148]

The grand jury proceedings were held in November 1960. Deegan, who called Weinstein before appearing and who admitted that he lied before the grand jury, was met by George Barnard and John Barnard after his appearance and upon telling them what he had said was told "that is a good job."[149] Boisjolie, too, was met directly after he testified before the grand jury, by Lassiter, from whom he learned that Knippel had recently approached a minor about becoming involved in an accident.[150]

On December 30, 1960, Weinstein paid Saunders' hospital bill although he did not discuss the settlement with Saunders, who approved the same, until after the filing of the indictment on January 20, 1961.[151] And on January 21, 1961, prior to being arrested pursuant to the secret indictment returned the day before, Johnstone advised Boisjolie to get out of town and told Boisjolie to go to Weinstein for the necessary funds.[152]

QUESTIONS PRESENTED

1. Was the evidence adduced at trial sufficient to support the convictions for (a), mail fraud; and (b), conspiracy?

2. Was it error as a matter of law, or an abuse of discretion, to deny a separate trial to one charged as a participant in a unitary scheme to defraud and for substantive offenses constituting a part thereof?

3. Was it error to curtail cross-examination directed toward the merits of a pending indictment upon which the indictee-witness had not been brought to trial at the time of cross-examination?

4. Was it error to excise portions of statements, and refuse others, made by the witness when the subject matter thereof did not relate to the subject matter of the testimony given by the witness?

5. Does the date of the last overt act alleged in the indictment, when proven, determine the duration of a conspiracy when other evidence demonstrates that the object of the conspiracy was not accomplished until later? And, if so, were hearsay statements of a conspirator made after such date improperly admitted?

6. Did the trial court err in its instruction upon the subject of conspiracy?

7. Was it a deprivation of the constitutional guarantee of the right of counsel for the trial court to limit argument to a total of three and one-half hours for appellants, out of the six hours allotted to ten defendants at the conclusion of trial?

8. Does the federal court have jurisdiction of a scheme to defraud which utilizes the mails in the furtherance thereof when the scheme itself could otherwise be prosecuted only in the state court?

9. Is the incarceration of a defendant during the course of his trial, of itself, a deprivation of the constitutional guarantee of the right to counsel?

10. Does the substitution of counsel at the start of trial deprive a defendant who has been represented by counsel for seven months prior thereto, and who consents to the substitution, of the effective assistance of counsel?

11. Will this court review a trial court's order denying a motion for new trial when the order is grounded upon findings of fact which in turn are supported by the evidence adduced at the hearing upon such motion?

SUMMARY OF ARGUMENT

On the basis of the evidence adduced at trial reasonable minds could find that every hypothesis but that of guilt was excluded, both as to the substantive charges of mail fraud and as to the conspiracy charge. However, since the sentences imposed were concurrent, and the sentence imposed with respect to the conspiracy charge was no greater than that assessed on the substantive mail fraud charges, it is unnecessary for this court to review the convictions on the conspiracy charge.

There was no error in refusing a separate trial to appellant Weinstein for he was charged as a conspirator in a unitary scheme to defraud insurance companies, and also charged with substantive offenses, under 18 U.S.C. 1341, which were portions of the overall scheme as to which he was charged. In view of the allegations in the indictment, and the proof at trial, there was no prejudicial misjoinder, nor was an abuse of discretion shown.

There was no error in curtailing cross-examination of the witness Deegan for the reason that extensive cross-examination directed to the possibility of bias and interest on the part of Deegan was permitted. The cross-examination of Deegan was curtailed only when counsel attempted to examine into the merits of another and different charge as to which

the witness then stood indicted. When it came to Mrs. Deegan counsel attempted, by cross-examination of her, to inquire into Deegan's interest on bias and into the merits of the indictment upon which he then stood charged. Cross-examination of her, on these subjects, was properly curtailed.

The statements taken from the witnesses Hart and Mrs. Deegan contained matters other than that the subject of their direct examination and, accordingly, the trial court correctly refused to allow their production, either in toto or in part, upon demand under 18 U.S.C. 3500.

A conspiracy does not end until its object has been accomplished, and statements made by a conspirator in furtherance of the conspiracy, to the extent that they be hearsay, are admissible against a co-conspirator not present even though they occur after the last overt act alleged in the indictment, provided the object of the conspiracy has not been fully attained at the time of the statement. But the statements here complained of were not hearsay, or, if so, subject to limiting and protective instructions. In any event, if error there was, it was harmless error.

The trial court's instructions on the subject of conspiracy, viewed in their entirety, as they must be, were a correct statement of the applicable law.

Argument totalling three and one-half hours for appellants, with no less than 30 minutes allotted to any one of them, was a matter within the discretion of the trial judge, charged with the duty of expediting trial, and under the facts of this cause such restriction was neither an abuse of that discretion nor a deprivation of appellants' constitutional guarantee of the right to counsel.

Since the very nature of the fraudulent scheme concocted in the instant cause was such that the use of the mails could reasonably have been foretold, as in the normal course of business incident to effectuating the end result, the matter was properly one for federal prosecution, even though the scheme itself, independent of its utilization of the post office, would not have been a federal offense.

The incarceration of a defendant, who has ready access to his attorney at all times, during the course of trial is not a deprivation of his right to counsel. Accordingly the refusal of the trial court to grant the defendant's motion to continue the principal cause, (involving other co-defendants, and their counsel, as well as many other co-conspirators), until he could be tried on another and subsequent charge for which he was incarcerated, was not an abuse of discretion.

A defendant is not deprived of the effective assistance of counsel where, at the start of trial, there is a substitution of counsel for one who has been representing him for seven months on the same charge. This is particularly true when the defendant consents to the substitution and substituted counsel have the assistance of former counsel, some independent familiarity with the cause, and a recess is given within which to become familiar with the materials gathered in preparation for trial by former counsel.

Where the denial of a motion for new trial made upon the ground of newly discovered evidence is predicated upon findings of fact well substantiated by the evidence adduced at the hearing upon said motion an appellate court will not review the matter.

ARGUMENT

I. THE EVIDENCE OVERWHELMINGLY SUPPORTS THE JURY'S VERDICTS OF GUILTY AS TO APPELLANTS WEINSTEIN, JOHN BARNARD, KNIPPEL AND LASSITER e/

The sentences imposed with respect to the conspiracy charge, as to appellants John Barnard, Knippel and Lassiter, are to run concurrently with the sentences imposed with respect to the substantive mail fraud charges assessed to each; and the sentences are no greater with respect to the conspiracy charge than with respect to those assessed on the substantive mail fraud counts. Accordingly it is unnecessary for this court to review the conviction upon the conspiracy charge, and the contention made by said appellants with respect thereto, if it finds that the respective convictions can be upheld on any of the substantive counts. Lawn v. United States, (1957) 355 U.S. 339, 362; Pinkerton v. United States, (1946) 328 U.S. 640, 642, fn. 1; Hirabayashi v. United States, (1943) 320 U.S. 81, 105; Sherwin v. United States, (C.C.A. 9,

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e/ NOTE: Since four of appellants contest the sufficiency of the evidence to support the verdicts on the substantive counts, as well as the conspiracy count, appellee has combined its arguments as to the sufficiency of the evidence in this section. Appellee, therefore now answers Weinstein's Specifications of Error I and V, John Barnard's Specifications of Error I and III, Knippel's Specification of Error I, and Lassiter's Specification of Error I. George Barnard does not contest the sufficiency of the evidence to support his conviction.

1963) 320 F.2d 137, 156, cert.den. 375 U.S. 964; United States v. Bentvena, (C.C.A.2, 1963) 319 F.2d 916, 953-4 cert. den. sub nom. Mirra, et al v. United States, 375 U.S. 940; Twitchell v. United States, (C.C.A. 9, 1963) 313 F.2d 425, 430.

Insofar as Weinstein is concerned the rule is identical. On the substantive counts VI, VII and VIII he received a sentence of four years upon each, that upon VI and VII to run consecutively, that upon VIII to run concurrently with VI. The sentence upon count IX (the conspiracy count) was for four years and to be served concurrently with the sentence imposed as to count VII.

We submit that the record is replete with evidence to support, and devoid of error with respect to, the convictions of said appellants on the substantive charges of mail fraud. However, since appellants have devoted considerable attention in their respective briefs, by incorporation of another brief or otherwise, to numerous assignments of error, we have attempted to meet the contentions advanced by each.

Preliminarily it should be noted that, as Weinstein says (Br. p.14), there can be no doubt that the mails were used, although his conclusion that they were only "very incidentally" employed does not agree with the facts. For the record is replete with mailings in furtherance of the scheme. 153/

The very nature of the fraudulent scheme was such that the participants must reasonably have foreseen that the mails would be used, in the ordinary course of business, before the objects of the scheme could be attained. Of necessity, the mailings were an integral part of the plan. And, all the other elements of mail fraud present, this is enough to sustain a conviction. Pereira v. United States, (1954) 347 U.S. 1, 8-9; Fisher v. United States, (C.C.A. 8, 1963) 324 F.2d 775, 780. We proceed, therefore, to a discussion of the evidence which overwhelmingly demonstrates the fraud, the knowing participation of appellants therein, and their combination to effect the perpetration thereof.

While Weinstein expresses some reservations on the subject, (Br. p. 15), only John Barnard seriously contests the sufficiency of the evidence to establish the collision of August 18, 1958 as staged. Although no participant testified that this collision was staged f/ the absurdity of the contention that it was not appears from a cursory examination of the facts. g/

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f/ Allison confessed, but the confession was offered, and admitted with cautionary instructions, only as against Allison. 153A/

g/ In order to avoid the proliferation of Record references, facts hereinafter restated in support of argument will, for the most part, be referenced at the conclusion of each paragraphed collection thereof. Under the appropriate reference number in the Appendix will appear the collection of references which support the facts restated.

Giegerich, brought to Oregon by George Barnard for the very purpose, rear-ended a vehicle driven by Allison and containing John Barnard, supposedly with such force as to break the steering wheel against Allison's chest yet moving the vehicle only 13 feet and leaving Allison with a perfectly normal chest. Allison, with no other vehicle in front of him, stopped sufficiently far away from the intersection to avoid being forced therein and left prey to cross-traffic. The investigating officer found Allison devoid of any explanation for such abnormal stopping procedure and all participants on friendly terms. Furthermore, the address on the Giegerich driver's license was 334 S.E. Grand, (Ex. 80B), yet Allison reported him as residing at 12536 S.E. Lincoln Ct.,(Ex.99A), an address ostensibly known only to Giegerich and George Barnard at the time of the collision. It is unreasonable to conclude that Allison would have obtained any address other than that appearing on Giegerich's driver's license if the collision had been, in fact, an accident.[154]

The investigating officer found a friendly attitude because the participants were friends engaged in a joint enterprise. And this conclusion is buttressed by two other facts: (a) Weinstein had no difficulties in reaching Giegerich, an old friend of George Barnard, in California directly by mail, although every address given by Giegerich in the Portland area was fictitious; and (b) Weinstein began

issuing checks to John Barnard, pending settlement of the latter's claim for damages, more than a month before the collision, (a month and a half before assuming representation), and was repaid out of the proceeds of settlement. (RIII 5330/11-22). 155/

That the remaining collisions were staged is conceded by Weinstein, (Br. p. 15), and not contested by appellants Knippel and Lassiter.

The fraudulent nature of the scheme, and the mailings in furtherance thereof, being established it remains only to determine whether or not there was sufficient evidence to connect appellants therewith, and demonstrate both their knowledge of the fraud and their concert of action with respect thereto. That there was an abundance of such evidence is clear from what follows:

A. THE EVIDENCE OF WEINSTEIN'S GUILT

Weinstein told Perrin that he was just a banker, not an attorney, and through the period for which he was charged he certainly acted in that capacity. For he advanced money not only to his own clients, but as well to one not yet his client, (John Barnard), and to those who were supposedly the clients of another attorney, (Kerr, McCoy and Rose). He gave Saunders $200 to $300 the day after his collision and wired funds to Wooldrige, in Cheyenne, even though the latter's case did not look good. 156/

While George Barnard generally dressed rather shabbily and never seemed to have much money he visited Weinstein's office several times a week and on August 16, 1958 received $100 from him. Five days later George purchased a car for $100 which was used in a staged collision that provided clients for Weinstein. In September he received $575 from Weinstein and in October again obtained in excess of $100. Interestingly enough it was during this period that George Barnard paid Scott $500 to rear-end the Rose vehicle while telling Rose and McCoy to get Weinstein to handle their claims.[157]

When the time came that Deegan was concerned lest his wife reveal to the investigators that the collisions had been staged it was Weinstein who gave the Deegans money to get out of town.[158] This alone was sufficient to support a finding that Weinstein knowingly participated in the fraudulent scheme. See Kaplan v. United States, (C.C.A. 9, 1964) ____ F. 2d _____, (No. 18741 decided Mar. 13, 1964).

Weinstein referred Saunders to Dr. Davis of the Orthopedic and Fracture Clinic, but it was Weinstein to whom the clinic looked for payment of the Saunders' bill, and who in fact paid it on December 30, 1960. This was the same Dr. Davis to whom both McCoy and Deegan were referred by George Barnard, McCoy receiving the card of the Orthopedic & Fracture Clinic from George Barnard at the same time he was handed one of Weinstein's cards.[159]

Appellants would characterize these advances as "loans", and some of the Government witnesses used that expression, but it matters not what they be called. For the scheme was to defraud insurance companies on the matter of personal injury claims and a loss of employment helped make the injury look good. Weinstein went so far as to instruct the Deegans not to work.[160] However, a loss of employment needs underwriting. Financing at least until the ill-gotten gains could be divided. And "loans" in advance of an "accident" yet to happen acquire a peculiar significance.[161]

Perhaps of even greater significance is the fact that Weinstein continued to make these "loans" to another attorney's clients after he was alerted to talk that the collision had been staged.[162]

But Weinstein was more than a banker. He instructed the Deegans on how to feign the injuries which they did not have. He convinced Saunders to act like an injured man, when he was not. He directed the damaging of the Deegan car, and then its disposal when he realized that photographs would reveal the fraud. It stretches credulity beyond the limits of elasticity to say that these were the facts, or counseling, of an attorney who was "fooled."[163]

And there was Giegerich, who had given many different addresses, none of them correct, during his stay in Portland; although George Barnard, an old friend, knew his address for

he was accustomed to visit Giegerich at Santa Fe Springs, California. It is hardly surprising, then, to note that during the period when George Barnard was visiting Weinstein's office several times a week that Weinstein sent a registered letter to Giegerich at his home address.[164]

Appellant argues that Weinstein must be believed when he states that he received the Giegerich address from Minor, claims manager for Fireman's Fund. There are two answers to that: First, it is an erroneous legal premise, Elwert v. United States, (C.C.A. 9, 1956), 231 F.2d 928, 933-4; Second, Weinstein had already been demonstrated a liar, in at least two particulars. (a. In concluding the Saunders' settlement Weinstein had simulated the Saunders' signature, as near as he could to the way Saunders would have signed it, and then signed his own name as witness to the Saunders' signature. Under any view of the evidence the latter was a falsehood for Weinstein knew that Saunders was not present; and it throws considerable doubt on the validity of the alleged power of attorney which Weinstein produced at trial. b. Weinstein signed, and filed, complaints for both Deegans, in which he alleged that they were caused to sustain back and neck injuries as "a direct and proximate result of the negligent acts and omissions of the defendant." Yet they were not injured and he found it necessary to instruct them as to how to act so as to indicate that they were.)[165]

Weinstein received the Deegan settlement check but it was not he that notified his clients that the funds in settlement of their claim had arrived. It was George Barnard who came to the Deegan's home to advise them that the check was at Weinstein's office.[166] The reason for this is obvious. Barnard had a financial interest in the result, just as did Weinstein, and the latter knew it. How else explain the employment of Barnard as a messenger boy - rather than a letter or the telephone?

Weinstein demonstrated his knowledge of the fraudulent nature of things, too, in his efforts to cover up the manner in which he had obtained the participants as clients. He asked the Deegans to say that Irene Blair had referred them to him, when in fact it was George Barnard. He asked Rose and Gordon McCoy to say that Bob Svilar had referred them to him, when in fact it was George Barnard, even to the extent of giving them Weinstein's card.[167]

Weinstein deepened his cover, when talk reached him that the collisions were said to be staged, by referring the participants to his associate, (with whom he split the fee). But when he learned that the insurance company was about to deny coverage on the collision of January 17, 1959, (by opening the letter of April 5, 1959, addressed to Wooldrige, care of Weinstein), he again actively participated, rather than risk the failure of collection from that collision.

(At the time of trial Weinstein produced the letter, and opened envelope). Wooldrige had earlier endorsed a check which Weinstein had given him with the address 8828 N.Dwight. To this address came Knippel, ostensibly Gray's client, seeking Wooldrige, only to be referred to Mrs. Havel, the mother of Wooldrige's girl friend, from whom he obtained a Council Bluff,Iowa, address. Mrs. Havel thereafter received a telephone call from a man announcing himself as attorney Weinstein, of Weinstein and Gray, to whom she said that Wooldrige resided in Council Bluffs, Iowa. In December 1959 it was not Gray, ostensibly Knippel's attorney, but Weinstein, who wrote the insurance company that the Wooldrige address was 1809 S.Sixth St., Council Bluffs, Iowa. Then, for the first time, the insurance company was able to locate Wooldrige, the driver of the vehicle upon which they had the coverage.[168]

It is true that no witness testified that Weinstein said to them: "I knew these collisions were staged right from the start and I helped direct and promote the whole scheme." It was hardly likely that he, an attorney, would make such a statement, even to George Barnard. Weinstein says: "There is no testimony that anyone told Weinstein about any collision being staged." (Br. p. 158) But someone did. For Weinstein told Rose that "there is some talk of this accident being a phony or a fixed accident." Any normal attorney,

upon being advised that he might be representing participants in a staged collision, would have cross-examined his clients, not tell them how to answer such allegations and transfer them to an associate with whom he would split the fee.[169]

Weinstein says "The issue is knowledge." (Br.p.15). On that issue, in an analogous situation, Judge Friendly, speaking for the court in United States v. Benjamin,(C.C.A.2, 1964) _____ F.2d _____. (No. 28404, decided February 17, 1964) had the following comments:

> But, as Judge Hough said for this court years ago: "when that state of mind is a knowledge of false statements, while there is no allowable inference of knowledge from the mere fact of falsity, there are many cases where from the actor's special situation and continuity of conduct an inference that he did know the untruth of what he said or wrote may legitimately be drawn." Beutel v. United States, 13 F.2d 327, 329 (2 Cir), cert. denied sub nom; Amos v. United States, 273 U.S. 713 (1926). (Id. p. 1081.)
>
> As Judge Learned Hand said in a similar context: " . . . the cumulation of instances, each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any one of them alone." United States v. White, 124 F.2d 181, 185 (2 Cir. 1941). (Id. p. 1083.)
>
> " . . . the government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see . . ." (Id. p. 1083.)

With the foregoing in mind, it is evident that no reasonable jury could come to any other conclusion than that Weinstein was guilty as charged in light of the record before it. The possibility that unless he were a party

to the venture George Barnard, et al, would have associated with him to the extent shown by the record below "is too remote for serious discussion." See Delli Paoli v. United States, (1957) 352 U.S. 232, 236; where court adopts the language of Judge Learned Hand appearing in 229 F.2d at 320. Cf. United States v. Green, (C.C.A.7, 1964) 327 F.2d 715,717, rhrg. den., pet.for cert. filed 4/7/64, sub nom. Gayles v. United States.

B. THE EVIDENCE OF JOHN BARNARD'S GUILT

John Barnard's participation in the scheme was sporadic, perhaps explained by the fact that at one stage he and his brother George were on the outs (RIII 1463/1-5); but, like a buzzard, he hovered over the scene from beginning to end.

He was a passenger in a vehicle, driven by his close friend Allison, involved in the collision of August 18, 1958, which obviously was staged, (supra pp. 36-38). Approximately a month before the collision he went to Weinstein and obtained the first of a long series of advances, four of them before the collision, all of which were repaid from the proceeds of settlement on his claim for injury. Although Weinstein had earlier represented him, such representation had been concluded May 1, 1958, two months before the first of the series of checks and three months before the collision. 170/

He participated with his brother George in a conversation at which Scott was told how to testify during the trial of the Rose case, and he was at the scene, observing, when Johnstone ran into DePlois. Standing alone this latter fact could be of little significance. However the only collision scenes where George Barnard's supervision was not noted were the ones in which John Barnard was himself either a passenger, or, as in the Johnstone-DePlois fiasco, an observer. Coupled with the other evidence of John Barnard's contribution to the objects of the scheme this appearance cannot be deemed coincidence. For the record is clear that the latter collision was staged.[171] Cf. United States v. Monica, (C.C.A. 2, 1961) 295 F.2d 400, 401-2, cert. den. 368 U.S. 953; United States v. Migliorino, (C.C.A. 3, 1956) 238 F.2d 7, 10.

It was John Barnard who collected from Smith a portion of the proceeds of settlement demanded by George Barnard, and it was also he who, again with his brother George, came to check on Deegan's performance before the investigating grand jury.[172]

C. THE EVIDENCE OF LASSITER'S GUILT

Lassiter appears to have joined the conspiracy on September 5, 1959 when, in company with his friend Knippel, he joined in the planning of the collision for that date. Nothing could be clearer, from the direct evidence in the record, than Lassiter's direct involvement in the staging of the September 5 collision. A friend of both Knippel and Johnstone, he met with George Barnard, Knippel, Kimmel and DePlois to plan the collision in which Johnstone would rear-end DePlois. He was thereafter, along with Knippel, directed by George Barnard to break the front seat of the DePlois vehicle. He was then observed, with Knippel, to take the vehicle away and shortly thereafter return the same with the front seat broken back. There can be no reasonable conclusion but that he had done what he had been told to do.[173]

Lassiter asks how can he, by reason of this act, be guilty of mail fraud? The answer is simple. He helped with others to plan a collision whose participants were to misrepresent the facts in order to obtain money from an insurance company. Knowing the fraudulent nature of the affair, he actively participated in setting the stage for the events which he could reasonably anticipate would cause the mails to be used in the normal course of business in settling the

claims which were to be asserted following the collision. That was sufficient to establish his guilt. Babson v.United States, (C.C.A. 9, 1964) _____ F.2d _____, (No. 18410, decided April 8, 1964); United States v. Bentvena, supra, p. 927-8; Blue v. United States, (C.C.A. 6, 1943) 138 F.2d 351, 358, cert. den. 322 U.S. 736; Silkworth v. United States, (C.C.A. 2, 1926) 10 F.2d 711,717, cert. den. 271 U.S. 664.

Lassiter's activities, however, did not stop with the preparation and planning for the September 5 collision, for in March 1960, he and Knippel were again attempting to set up another staged collision. And, in October 1960, when Mrs. Boisjolie called Weinstein to tell him that Boisjolie had been picked up by the investigating officers it was Lassiter, accompanied by Knippel, who came to Boisjolie's home, first at 11:30 PM, and then at 5:30 AM, for the purpose of advising Boisjolie to leave town and to get in touch with Weinstein for the money to do so. Lassiter also kept a check on Boisjolie during November 1960 to assure that only the information desired reached the then investigating grand jury.[174]

D. THE EVIDENCE OF KNIPPEL'S GUILT

Knippel first joined the conspiracy in October, 1958 when he and George Barnard outlined for Scott the plan for the October 16 collision. Knippel told Scott at that time

that he would insure that the other participants turned over to George Barnard part of the money they expected to collect. A year later, while the jury was deliberating on the Rose action, Knippel and George Barnard, accompanied by Boisjolie, again met with Scott and Scott was told to go with Knippel to collect Barnard's share of the money from Rose.[175]

In December 1958, Knippel and George Barnard, this time in Deegan'spresence, were discussing the planning of yet another staged collision, and shortly thereafter, Knippel rode as a passenger in just such another one. In this instance Knippel assisted George Barnard in giving final instructions to Wooldrige, the driver of the car which was to hit that in which he rode. Like Kerr, Rose and McCoy, he went first to Weinstein and by him was referred to Gray although, it was Weinstein who thereafter advanced monies to Knippel.[176]

When Wooldrige disappeared it was Knippel who came tracking him down at the address which appeared on an endorsement of Weinstein's check to Wooldrige. Note that when the address of Wooldrige was communicated to the insurance company it was not through Knippel's attorney Gray, but through Weinstein.[177]

Knippel came with George Barnard to DePlois' home to discuss the forthcoming collision of September 5, 1959. Still later that evening Knippel participated in a planning conference for the collision, with George Barnard, Lassiter,

DePlois and Kimmel, before taking the DePlois vehicle away, with Lassiter, to return it with a broken front seat - after being told to do so by George Barnard.[178] This was enough to establish his guilt. See United States v. Bentvena, supra, pp. 927-8. United States v. Guiliano, (C.C.A. 3, 1959) 263 F. 2d 582, 585; United States v. Migliorino, supra, p. 9.

Knippel did not stop his activities with the September 5 affair but attempted both in March 1960, (with Lassiter), and in September 1960 to arrange another staged collision. And when Mrs. Boisjolie called Weinstein to tell him that Boisjolie had been picked up for interrogation, it was Knippel and Lassiter who came to warn Boisjolie to leave town and look to Weinstein for the money to do so.[179]

E. THE MOTIONS FOR JUDGMENT OF ACQUITTAL WERE PROPERLY DENIED

Appellants contend that the trial court erred in denying their respective motions for judgment of acquittal, and John Barnard, Knippel and Lassiter assert that the error occurred in the denial at the close of the government's case. However, since all three thereafter proceeded to adduce evidence in their own behalf,[180] this court will look to the entire record to determine whether or not there was a sufficiency of evidence to support the judgment of conviction.

United States v. Calderon, (1954) 348 U.S. 160, 164; Benchwick v. United States, (C.C.A. 9, 1961) 297 F.2d 330, 335.

What, then, examining the entire record, is the test to be applied? Citing, and quoting freely from, a plethora of cases alleged to support his view Weinstein argues that the rule for which he contends is stated in United States v. Saunders, (C.C.A. 6, 1964) 325 F.2d 840, (Br. p. 72), and that "some doubt has arisen in this court as to the true test to be applied in determining the sufficiency of the evidence." (Br. p. 64). Nothing could be further from the fact. There is neither doubt in this court, nor validity to the Saunders rule. On that very issue, and while dealing with a similar argument based on Saunders, this court has only recently said: "The view urged upon us is not the law. The current correct test is whether ' reasonable minds could find that the evidence excludes every hypothesis but that of guilt.'" Kaplan v. United States, supra. See also Woxberg v. United States, (C.C.A. 9, 1964) _____ F.2d _____(No. 18805, decided March 12, 1964); and Byrnes v. United States,(C.C.A.9, 1964) 327 F. 2d 825, 829, fn. 5a. And the test is the same whether the evidence be direct or circumstantial. Kaplan v. United States, supra; Foster v. United States, (C.C.A. 9, 1963) 318 F. 2d 684, 690.

It may be that the "two different rules" of which Weinstein speaks (Br. p. 65) are in fact but two different expressions of the same rule, for in a recent case the Sixth Circuit defined "substantial evidence" as that "which a reasonable mind might accept as adequate to support a conclusion." United States v. Barnes,(C.C.A. 6, 1963) 313 F.2d 325, 326. In any event the rule in this circuit is crystal clear. Kaplan v. United States, supra.

Certainly upon the evidence adduced in the instant proceeding reasonable minds could find that it did exclude every hypothesis but that of guilt. The trial court and jury would have indeed been naive to arrive at any other conclusion. Accordingly the motions for judgment of acquittal were properly denied.

F. THE EVIDENCE ESTABLISHED A SINGLE CONSPIRACY

Appellants contend, relying upon Kotteakos v. United States, (1946) 328 U.S. 750, and Rocha v. United States,(C.C.A. 9, 1961) 288 F. 2d 545, cert. den. 366 U.S. 948, that the Government failed to prove an overall conspiracy; that at best it proved only a series of unrelated conspiracies. (John Barnard Br. pp. 14-15; Lassiter Br. pp. 9-11; Knippel Br. pp. 9-10; Weinstein Br. pp. 114-119). In light of the facts here present the reliance is misplaced.

In both Kotteakos and Rocha there were a number of isolated transactions, each with different participants having nothing to do with the others, as to which there was but one "common key figure." The instant case is quite different in that there was one overall scheme, albeit envisioning a series of substantive offenses. But the latter fact does not make the conspiracy charged fail for duplicity. Frohwerk v. United States, (1919) 249 U.S. 204, 209-10; United States v. Crosby, (C.C.A. 2, 1961) 294 F.2d 928, 945, cert. den. sub nom. Mittleman v. United States, 368 U.S. 984, rhrg. den. 369 U.S. 881. For, as Justice Holmes, in writing for the court in United States v. Kissel (1910) 218 U.S. 601, put it:

> ". . . when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." Id. p. 607

In the instant case the conspiracy was to mulct insurance companies, in gross, through a continuing series of staged collisions. It was, of course, essential to the scheme that the truth of the events be kept concealed. Otherwise, successful accomplishment of the scheme, a flow of money from the insurance companies for distribution amongst the participants, would have been impossible. This

was the "continuous result" contemplated; and the "continuous cooperation" called for was the management, direction, financing and control of the actors. To these ends were devoted the talents of George Barnard, Weinstein and John Barnard, with an assist from Knippel and Lassiter.

George Barnard was unquestionably a "key figure", for he was exposed with each differing facet of the scheme brought to light. But he was not alone, for working with him throughout the period charged were Weinstein and John Barnard. The former as the attorney necessary to process the scheme through the appropriate channels, and as financier for the participants; the latter as combination actor-overseer-collector for brother George. Weinstein combined with George Barnard from the beginning and was still acting on behalf of the enterprise in September 1960 when he paid Deegan to get Mrs. Deegan out of town before she started to talk. See Kaplan v. United States, supra. So, too, with John Barnard who, while intermittent in his appearances, came early and stayed late. While Knippel appears first in October 1958, and Lassiter in January 1959, both thereafter continued in concert with George Barnard through 1960.

In light of the continuance of efforts in behalf of the fraudulent scheme by both Weinstein and John Barnard, Allison, (a convicted co-defendant who does not appeal),

too, appeared in both the first and last acts 7, it is difficult to reach even a bifurcation of the overall plan. But if it be considered that George Barnard worked with one group from mid-1958 through late 1959 (Weinstein, John Barnard), and with another from late 1959 through 1960, (Black, Ruben, Knippel, Lassiter), it still does not establish duplicitous error. For it is unnecessary to show that each co-conspirator knew all the others, or that each witness mention all, or that each one be involved throughout the entire perior charged. United States v. Green, supra; United States v. Micele, (C.C.A. 7, 1964) 327 F. 2d 222, 225; United States v. Stromberg, (C.C.A. 2, 1959) 268 F. 2d 256, 264. However, by any reasonable view of the evidence, the participation of George Barnard, Weinstein and John Barnard from start to finish is abundantly established. When later joined by Knippel and Lassiter the five continued until stopped.

In Blumenthal v. United States, (1947) 332 U.S. 539 the court, although admitting that the evidence disclosed two agreements, found that the two agreements were tied together as stages in a larger and all-inclusive combination directed to achieving a single unlawful end. Id. p. 558. Justice Rutledge (he who delivered the opinion in Kotteakos), disguished Kotteakos from the Blumenthal situation in that the former lacked any showing of mutual aid and interest between those with whom the sole common figure was alleged to have

conspired. In making the distinction he further said, of the Blumenthal facts:

> All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan. He thus became a party to it and not merely to the integrating agreement with Weise and Goldsmith.
>
> We think therefore that in every practical sense the unique facts of this case reveal a single conspiracy of which the several agreements were essential and integral steps, and accordingly that the judgments should be affirmed. (Id. p. 559)

Amongst appellants there was that concert of interest and cross-play of aid, quite apart from their interest in recovering the results of their own acting, of which Justice Rutledge spoke in Blumenthal. Witness John Barnard, collecting his brother George's share of Smith's recovery, and his aid to George in instructing Scott as to the latter's testimony in the Rose trial. Witness also Knippel, assisting in the staging of the DePlois collision, and in the planning of the Rose collision.

Lastly, we comment briefly on appellants' great stress upon the words "circumstantial evidence". Suffice it to say that "it is recognized that conspiracies are seldom capable of proof by direct testimony and that it is settled that they may be inferred from the acts of the parties thereto." Pennington v. United Mine Workersof America, (C.C.A. 6, 1963) 325 F. 2d 804, 811.

We submit that the record in this case establishes beyond peradventure that the conspiracy was unitary and the proof thereof overwhelming.

II. DENIAL OF SEVERANCE AS TO WEINSTEIN WAS NOT IMPROPER

Appellant Weinstein's Specification of Error No. II is that the trial court erred in denying his Motions for a Separate Trial.[181] He asserts the error in two respects. First, that there was an abuse of discretion in the refusal to permit a severance and, second, that there was a misjoinder requiring severance as a matter of law. We dispose of these contentions in reverse order.

There is no dispute that the motions of appellant for severance were timely. However, the authorities cited do not support Weinstein's contention that the denial of severance here was error as a matter of law.

Appellant relies upon a footnoted comment addressed to a brief filed by the Government in Williamson v. United States, (C.C.A. 9, 1962) 310 F. 2d 192, 197 fn. 16. Certainly Williamson itself is of no aid to Weinstein, for the court there found proper the denial of a motion for severance, but upon facts not present in the instant case. As to the footnote, the court palpably was directing itself to the

situations found in Ward v. United States, (C.A.D.C. 1961) 289 F. 2d 877 and Ingram v. United States, (C.C.A. 4, 1959) 272 F. 2d 567. Situations quite different from that found in the instant proceeding.

The Ward case dealt with a seven-count indictment involving three separate and unrelated narcotics sales. The appellant there was joined, and charged as to the first two, with another defendant who was the only one charged as to the third sale. The latter sale was unrelated to the earlier transactions and the court noted particularly that there was no conspiracy charged. (Id. p. 878) For lack of any connection the court held it a prejudicial misjoinder.

In Ingram, supra, the court said of the two cases consolidated for trial, involving two separate instances of removing, concealing and possessing non-tax-paid liquor, and no charge of conspiracy, that:

> "Aside from the identity of time and the relatively short distance between the two homes, there is nothing in the record indicating a connection between the violation of the Ingrams at 307 Hay Street with that of the Gills at 301" (Id p. 568)

On those facts the court held it a prejudicial misjoinder.

The inapplicability of United States v. Spector, (C.C.A. 7, 1963) 326 F. 2d 345 is immediately apparent when it is recognized that count one, of the nine-count indictment, dealt with a conspiracy which ended in November 1956, while

counts two through nine concerned substantive offenses the first of which occurred December 21, 1956. Only Spector and Scott were named in the conspiracy count while Jacobs and Starr were joined with Spector in the remaining counts. Scott was not charged with having participated in the acts or transaction alleged in counts two through nine, nor were Jacobs and Starr charged with violating the substantive statute underlying the conspiracy count. (Id. pp. 349-350) The Court there said:

> "In conclusion, it is apparent in the instant case that there is no identity of defendants, of the character of the offenses, the allegations of fact, or of the time. Therefore, a severance should have been granted." (Id. p. 351)

In the instant case the situation is much more analogous to that found in Slocum v. United States, (C.C.A.8, 1963) 325 F.2d 465 where essentially, as here, the motion for severance was grounded on the allegation that several disconnected schemes were charged and proved. The court there felt, as we submit this court should now feel, that "the scheme charged was sufficiently unitary to justify the joint trials of the defendants." (Id. p. 467)

Appellant's principal attack on the court's denial of his motion for severance, insofar as he contends it erred as a matter of law for misjoinder, must necessarily be based upon the somewhat slanted view he takes of Rule 8(b) Federal Rules of Criminal Procedure. It is, however, well established

that this rule permits the "joinder of all defendants engaged in a connected course of conduct out of which arose separate crimes alleged against different persons." Kivette v. United States, (C.C.A. 5, 1956) 230 F.2d 749, 753, cert. den. 355 U.S. 935; Wiley v. United States, (C.C.A. 4, 1960) 277 F.2d 820, cert. den. 364 U.S. 817; Kleven v. United States, (C.C.A. 8, 1957) 240 F. 2d 270; Scheve v. United States, (C.A.D.C. 1950) 184 F. 2d 695. And Williamson, supra, does not differ in its view (see cases cited fn. 16, 310 F.2d 197). In the instant case the fraudulent scheme to "take" the insurance companies is the "connected course of conduct" and the various collisions the "separate crimes" arising therefrom.

In Schaffer v. United States, (1960) 362 U.S. 511, the court found no prejudice in the refusal of severance where a conspiracy count was dismissed for failure of proof but separate substantive offenses were submitted to the jury. A fortiori where the conspiracy count is supported by sufficient evidence; for this is the count which, says the Supreme Court, "originally justified joinder". (Id. p. 516)

There being, then, no question of improper joinder the question is purely one of discretion for the trial court. Rule 14, Federal Rules of Criminal Procedure. Opper v. United States, (1954) 348 U.S. 84, 95; Fisher v. United States, supra, p. 881. Certainly the record in this case does not disclose that the trial court abused its discretion in denying

a severance, and appellant cites no authority demonstrating such an abuse. Appellant instead embellishes his argument by aphorisms more appropriate to the classroom than the courtroom.

Considerations of public policy in the administration of justice usually dictate that severance be denied, wanting a clear-cut showing of prejudice against which the trial court can exercise no sufficient protection. And the determination with respect to severance, being one left to the sound discretion of the trial judge, will not be disturbed on appeal absent a showing of a clear abuse of such discretion. Davenport v. United States, (C.C.A. 9, 1958) 260 F. 2d 591, cert. den. 359U.S. 908; (Accord: Shockley v. United States, (C.C.A. 9, 1948) 166 F. 2d 704, cert.den. 334 U.S. 350.) "Such a motion is rarely granted" (Id. p. 594). For

> Where two or more defendants are indicted for a joint transaction, it is inadvisable to split up the case into many parts for separate trials, in the absence of a very strong and cogent reason therefor. This is especially true in conspiracy charges, from the very nature of the case. Dowdy v. United States, (C.C.A. 4, 1931) 46 F.2d 417, 421.

Weinstein, eulogizing the role of lawyer in our society, attempts to find an abuse of discretion in that he as a lawyer was tried with those he "represented." The short

answer to that is found in a record brimming with instances where Weinstein did considerably more than "represent" a group he, quite appropriately, now labels "disreputable people." (Br. p. 77)

Finding no cogent reason, either from the record or appellant's argument, suggesting an abuse of discretion in the denial of the motions to sever we believe appellant's contentions are best answered in the oft-quoted words of Judge Learned Hand:

> A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats.
>
> United States v. Fradkin, (C.C.A. 2, 1935) 81 F.2d 56, 59, cert. den. 297 U.S. 720.

III. THERE WAS NO ERROR IN CURTAILING THE CROSS-EXAMINATION OF THE WITNESSES DEEGAN

Appellant Weinstein's Specification of Error No. III is that the trial court erred in curtailing the cross-examination of both Deegan and his wife. The area of inquiry which Weinstein was pursuing, when cut-off, involved the indictment of Deegan for an alleged violation of 18 U.S.C. Sec. 1503, and the events which occurred thereafter up to the time of Deegan's testimony.

Weinstein contends that the Sec. 1503 charge brought against Deegan was spurious and that it was of primary importance that he be permitted to show that it was spurious by the cross-examination of both Deegan and his wife. In taking this position he appears to confuse the right to interrogate with respect to what happened in regard to the Sec. 1503 charge with the right to inquire into the merits of a pending proceeding. He further completely overlooks the basis upon which the former line of interrogation is permitted. This becomes particularly obvious when analyzing his complaints anent the Mrs. Deegan cross-examination.

It is fundamental that the extent of cross-examination upon an appropriate subject of inquiry is within the sound discretion of the trial court, and that court may exercise a reasonable judgment in determining when a subject has been exhausted. Alford v. United States, (1931) 282 U.S. 687, 694. Long held appropriate areas of inquiry on cross-examination are those of bias, prejudice, interest, hope for immunity or reduction of sentence, and the coercive effect of detention by officials - in short, those matters affecting the witness' motive in testifying. Alford v. United States, supra; Thurman v. United States, (C.C.A. 9, 1963) 316 F.2d 205; United States v. Masino, (C.C.A. 2, 1960) 275 F.2d 129;

Spaeth v. United States, (C.C.A. 6, 1956) 232 F.2d 776; United States v. Hogan, (C.C.A. 3, 1956) 232 F.2d 905. And Weinstein was allowed full sway so long as he stayed within these appropriate areas of inquiry.

From Deegan Weinstein was permitted to, and did, develop that Deegan was indicted on September 1, 1961, for attempting to intimidate a witness in the instant proceeding; arrested and jailed that night under $50,000 bail which was reduced on September 5 to $20,000; that on September 7 while in Rocky Butte jail he gave a statement to the FBI and on September 8 entered a plea of guilty in the principal case; that on September 11 bail was reduced to $2500 and Deegan later released upon posting the same; that he had not at the time of testifying been sentenced, (on the intimidation charge), nor had he entered a plea; that he was staying at the New Heathman Hotel by arrangement of Government agents; that officers occupied the adjoining room and constantly accompanied him back and forth from the courtroom. This subject was even further developed through the testimony of Carskadon, Deegan's attorney.[182/] It was only when Weinstein attempted to inquire into the merits of the intimidation charge that he was cut short, as he should have been. See Lawn v. United States, supra, pp. 355-7.

On advice of counsel Deegan refused to answer questions dealing with the matters for which he then stood indicted under the intimidation charge, on the ground that his answers might incriminate him. (RIII 535/5 - 537/6). Deegan's claim of privilege was necessarily honored. Alford v. United States, supra, at 694.

Since Weinstein was allowed to, and did, inquire upon those subjects held a permissible line of inquiry in United States v. Hogan, supra, Sandroff v. United States, (C.C.A. 6, 1946) 158 F.2d 623, cert. den. 338 U.S. 947; and Farkas v. United States, (C.C.A. 6, 1924) 2 F. 2d 644, his reliance thereon seems inappropriate. Cf. United States v. Migliorino, supra, pp. 10-11.

So, too, with Masino and Spaeth, both supra. In the former, the court held only that the disposition of a state narcotic charge and the part played by government representatives in quashing the same was a permissible area of inquiry. Masino did not hold that inquiry into the merits of the state court charge was, or would have been, permissible. Nor did the Spaeth case deal with an inquiry into the merits of a pending charge. There the error was in curtailing cross-examination as to the circumstances surrounding an earlier trial, conviction and sentencing for bank robbery and the then incarceration of the witness, on the theory that "his testimony could well have been guided by his hope of an early parole." (232 F. 2d 779)

In the instant case the trial judge exercised that reasonable judgment called for in Alford, supra, in curtailing cross-examination, for the permissible areas of interrogation had been exhausted save for the attempt to infringe upon Deegan's constitutional rights, timely invoked.

The contention that the cross-examination of Mrs. Deegan was unduly restricted is completely without merit. For Weinstein attempted, by cross-examination of Mrs. Deegan, to interrogate on the subject of bias, motive or interest, on the part of her husband, an earlier witness. This was clearly not a permissible cross. It was equally impermissible to attempt, through her, to explore the merits of the intimidation charge.

A cursory examination of the offers of proof made by Weinstein (Br. pp. 93-97; 99; 101-103) indicates much that was developed in the cross-examination, much clearly immaterial, and much opinionative matter. (RIII 502/7-11). Under these circumstances, the trial court could reject the whole, as it did. Lane v. United States, (C.C.A. 9, 1944) 142 F. 2d 249, 253.

In concluding this portion it should be pointed out that the trial court time and time again indicated to Weinstein that he would be permitted to explore appropriate areas of inquiry concerning interest and bias. [183] Weinstein

can hardly be heard to complain now because he did not choose to wring them dry, but instead attempted to try the merits of a then pending collateral proceeding.

IV. THERE WAS NO ERROR IN WITHHOLDING PORTIONS OF THE HART AND GERALDINE DEEGAN STATEMENTS

Appellant Weinstein's Specification No. IV is that the trial court erred in denying him access to certain documents upon motion made pursuant to 18 U.S.C. 3500. The documents of which he complains are Court exhibits C, I and K.

Appellant was entitled to statements given by the witnesses insofar as they related "to the subject matter as to which the witness has testified", (18 U.S.C. 3500(b)), but the court was obligated to "excise the portions of such statements which do not relate to the subject matter of the testimony of the witness." 18 U.S.C. 3500(c). Appellant was not entitled to access to statements, or portions thereof, which did not relate to the subject matter of the testimony of the witness or which failed to meet the specifications of Sec. 3500(e), (which defines statements as used in the Act). Palermo v. United States, (1959) 360 U.S. 343, 354.

A comparison of Court Exhibits C, I and K with the direct testimony of Mrs. Deegan, (RIII 592-646), and Hart, (RIII 3487-3492), readily demonstrates the propriety of the action taken by the trial court.

V. THE CONSPIRACY CONTINUED UNTIL THE INDICTMENT WAS FILED, AND THE STATEMENTS OF THE CONSPIRATORS AFTER MAY 11, 1960 WERE PROPERLY ADMITTED.

Appellant Weinstein's Specification of Error No. VI is that the trial court erred in admitting hearsay after the termination of the conspiracy. This contention is based upon a misconception of the law of conspiracy and a misconstruction of the indictment.

Weinstein asserts that "the conspiracy ends with the last overt act alleged and proved" (Br. p. 131) (emphasis supplied). This is not the law. An overt act "is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime." Chavez v. United States, (C.C.A. 9, 1960) 275 F. 2d 813, 817. The crime of conspiracy is complete with the doing of the overt act. Fiswick v. United States, (1946) 329 U.S. 211, 216; Hyde v. United States, (1912) 225 U.S. 347, 359; Hoffman v. Holden, (C.C.A. 9, 1959) 268 F. 2d 280, 295, but, once established, it is presumed to continue until the contrary is demonstrated, United States v. Bentvena, supra, p. 947; United States v. Stromberg, supra, p. 263, cert.den. sub nom. Lessa v. United States, 361 U.S. 863, and it does not terminate until its object has been accomplished. Pinkerton v. United States, supra, p. 646; United States v. Kissel, supra, p. 607; United States v. Bletteman, (C.C.A.

2, 1960) 279 F. 2d 320, 322; Cleaver v. United States, (C.C.A. 10, 1956) 238 F. 2d 766, 769; Ferris v. United States, (C.C.A. 9, 1930) 40 F. 2d 837, 839. Particularly appropriate here, in light of Weinstein's contention, is the following:

> "The period of the conspiracy was a matter for trial and for proof and the burden was on appellant to show his disassociation from the conspiracy, once he had been connected, as he was, to it." Strauss v. United States, (C.C.A. 5, 1963) 311 F. 2d 926, 931, cert. den. 373 U.S. 910. h/

Appellant appears to confuse this palpably reasonable conclusion with the problem of when the statute of limitations shall start to run, which is the date of the last overt act alleged and proven. Fiswick v. United States, supra; Huff v. United States, (C.C.A. 5, 1951) 192 F. 2d 911, 915, cert.den. 342 U. S. 946; United States v. Johnson, (C.A.A. 3, 1947) 165 F. 2d 42, 45, cert. den. 332 U. S. 852, rhrg. den. 333 U.S. 834. Cf. Grunewald v. United States, (1957) 353 U. S. 391.

However, in the instant case, the indictment charged, and the evidence demonstrated, (See pp. 4-27 supra), a continuing conspiracy. (See Indictment; Cf. United States v. Kissel, supra; Grunewald v. United States, supra, at p.406, fn. 20). And so long as the conspiracy continued declarations

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h/ . . . "the only purpose of proof of the overt act is to eliminate the possibility of abandonment of the conspiracy." Castro v. United States, (C.C.A. 5, 1961) 296 F.2d 540, 543.

of conspirators were admissible against co-conspirators not present if made in furtherance of the objects of the conspiracy. Delli Paoli v. United States, (1957), supra, p.237.

Concealment was a necessary part of the conspiracy in the instant cause, as distinct from a "subsidiary objective of the conspiracy." (See Krulewitch v. United States, (1949) 336 U.S. 440, 443). And here there was evidence in the record "that the conspirators agreed to conceal the conspiracy by doing what was necessary and expedient to prevent its disclosure." 184/ (See Lutwak v. United States, (1953) 344 U.S. 604, 616). These efforts to conceal events were essential to the program of continuing the staged accidents, which the co-conspirators were still attempting to do in late 1960, 185/ for if the facts became known there obviously would be little likelihood of continuing in the program of milking the insurance companies. Note, for example, that Weinstein, as late as December 30, 1960, paid Saunders' hospital bill in order to close that matter from any untoward inspection, even if only from a bill collector.186/ "Secrecy and concealment are essential features of successful conspiracy", (Blumenthal v. United States, supra, p. 557), and in this case were crucial to its success.

In Grunewald v. United States, supra, the government asked the court to distinguish Krulewitch and Lutwak, both supra, on the ground that in those cases there had been an attempt to imply a conspiracy to conceal while in Grunewald, the government said, there was an actual agreement to conceal. The court, however, found no evidence to support the government's contention. (Id. p. 402) It stated that

> "The crucial teaching of Krulewitch and Lutwak is that after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." Id. pp. 401-2.

But that was not the case here. Weinstein said the investigators were "just fishing", and the attempts to set up staged accidents were still continuing.

Grunewald points up the difference, for it is there said:

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained. 353 U.S. 405.

Grunewald speaks of a hypothetical situation, apparently found in the government's brief, which is most analogous to the instant case. 353 U.S. 406-7, fn. 20. In meeting that hypothetical the court points out that "acts of

concealment could have been in furtherance of this aim by enabling the ring to stay in business so that it could get new cases." Id. p. 407 fn. 20. So, here, the acts of concealment were to enable the ring to stay in business so that they could stage more accidents.

With one exception, a portion of item 4 (Br. pp. 131), the statements complained of were demonstrative of the attempt to "stay in business" by keeping the participants quiet.

A. THE EVIDENCE WAS ADMISSIBLE EVEN IF CONSPIRACY DEEMED TO HAVE ENDED ON MAY 11, 1960

Weinstein refers to a "number of hearsay statements", (Br. p. 120), which he claims were improperly admitted over his objection repeatedly and timely made. Yet upon analysis items 1(a), 1(b), 1(c), (2) and (4) were either not hearsay or admissible under exceptions to the hearsay rule, having nothing to do with the doctrine anent declarations of co-conspirators.

Items 1(a), 1(b), 1(c) and (2), (W. Br. pp. 120-128) deal with a phone call which Boisjolie ordered his wife to place to Weinstein and the events which followed immediately thereafter. The placing of the phone call to Weinstein, and the resultant comments by him to Boisjolie's wife, was not only admissible but was direct evidence. United States v.

Benjamin, supra, fn. 3 at p. 1080; United States v. Bucur, (C.C.A. 7, 1952) 194 F.2d 297, 303-4; Jarvis v. United States, (C.C.A. 1, 1937) 90 F.2d 243, 245, cert. den. 302 U.S. 705; Van Riper v. United States, (C.C.A. 2, 1926) 13 F.2d 961, 968, cert. den. sub nom. Ackerson v. United States, 273 U.S. 702. Cf. Armstrong v. United States, (C.C.A. 9, 1964) 327 F.2d 189, 197. The subsequent appearance of Knippel and Lassiter following the telephone call, even if the conspiracy be deemed ended, was an act, as distinct from a declaration, and, hence, admissible. Lutwak v. United States, supra, p. 618. The comments made by Knippel and Lassiter upon their appearance, (actually two appearances, one at 11:30 PM the evening of the phone call, and the second at 5:30 AM the following morning), were likewise admissible as they were "contemporaneous with a non-verbal act, independently admissible, relating to that act and throwing some light upon it." United States v. Annunziato, (C.C.A. 2, 1961) 293 F.2d 373, 377, cert. den. 368 U.S. 919.

Item 4, (Br. pp. 130-1), was admissible as direct evidence tending to show that the conspiracy still existed as of November, 1960. (RIII 1246/22 - 1249/18). Weinstein did not object. (RIII 1249). Having failed to object at the time he cannot be heard to complain now. Fiano v. United States, (C.C.A. 9, 1959) 271 F.2d 883, 885, cert. den.

361 U.S. 964, rhrg. den. 362 U.S. 925; Trice v. United States, (C.C.A. 9, 1954) 211 F. 2d 513, 519, cert. den. 348 U.S. 900.

B. THE JOHNSTONE STATEMENT WAS PROPERLY ADMITTED, BUT IF NOT THE ERROR WAS HARMLESS.

If the conspiracy be deemed to have ended May 11, 1960 the Boisjolie testimony concerning Johnstone's statement, Item 3, (Br. pp. 128-9), was properly admitted. It certainly was admissible as against Johnstone, the declarant, and hence properly in the case. Lutwak v. United States, supra, p.618. The trial judge immediately instructed the jury, ("under the admonition given to the jury previously"), that it was not binding on the other defendants (which included Weinstein) "unless it's subsequently tied in with some matter." (RIII 1252/11-14), and again cautioned the jury in this regard in his final charge. (RIII 5864/13-19).

Even if the Johnstone episode, as testified to by Boisjolie, was improperly admitted it is difficult to see how any possible prejudice could have arisen, as to Weinstein, for the jury had already received direct evidence of a similar activity at about this time on the part of Weinstein from the Deegans. Cf. Cohen v. United States,(C.C.A. 9, 1944) 144 F. 2d 984, 989, cert. den. 323 U. S. 797, rhrg. den. 324 U.S. 885.

In light of the overwhelming evidence of Weinstein's guilt apart from this statement, (which was really merely cumulative evidence to the Deegan episode), the particular statement could have had little effect upon the jury and upon the substantial rights of Weinstein and is not ground for reversal. 28 U.S.C. Sec. 2111; Kotteakos v. United States, supra, p. 764; Palmer v. Hoffman, (1943) 318 U.S. 109, 116; Berger v. United States, (1935) 295 U.S. 78, 82; Ahlstedt v. United States, (C.C.A. 5, 1963) 315 F.2d 62, 66-7, cert. den. 375 U.S. 847; Starr v. United States, (C.A.D.C., 1958) 264 F. 2d 377, 381, cert. den. 359 U.S. 936.

If any error exists with respect to the admission of evidence of events after May 11, 1960, it is to the prejudice of the government. Until George Barnard received his "kick-back" from the participants in the accident of February 16, 1960, (Counts I and II), that portion of the scheme had not been completed. But evidence demonstrating that as of January 20, 1961 there was still money due George Barnard from D. McCoy was admitted only for a limited purpose. (RIII 3430/16-24). We believe that evidence should have been admitted for all purposes, since not until that date did the conspiracy terminate. See Strauss v. United States, supra.

VI. THE TRIAL COURT PROPERLY INSTRUCTED ON THE SUBJECT OF CONSPIRACY

Appellant Weinstein's Specification No. VII is that the trial court erred in instructing the jury on the proof of the existence of conspiracy. He attacks but one sentence[1] of the trial court's extensive instructions on conspiracy and states that "the instruction cannot be the law," (Br. p.139), although he cites no authority to support his contention.

We do not agree. Nor did Judge Medina when charging the jury in United States v. Foster, (S.D.N.Y., 1949) 9 F.R.D. 367, 378.

Learned Hand, C.J., stated of the Foster trial that "The record discloses a trial fought with a persistence, an ingenuity and - we must add - with a perversity, such as we have rarely, if ever, encountered." United States v. Dennis, (C.C.A. 2, 1950) 183 F. 2d 201, 234, (affirmed 341 U.S. 494, but this issue was not before the Supreme Court). Despite a multitude of "objections and complaints" asserted in 570 pages of briefs, (Id. p. 234), the Second Circuit made no comment on this instruction. For quite obvious reasons.

1/ "On the other hand, proof concerning the accomplishment of the objects of a conspiracy is the most persuasive evidence of the conspiracy itself." RIII 5862/9-12. Br. p. 138-9.

When coupled with the balance of the instructions addressed to the subject of conspiracy which were given by the trial court, (RIII 5858/8 - 5867/3), it correctly states the law.

VII. THE TRIAL COURT DID NOT ERR IN LIMITING THE TIME OF FINAL ARGUMENT j/

Appellants contend that they were deprived of the right to counsel, (guaranteed by the Sixth Amendment), in that the court limited the time for argument to: one hour, Weinstein; one hour, George Barnard; one-half hour, John Barnard; one-half hour, Knippel; and one-half hour, Lassiter; or a total of three and one-half hours for all appellants. (This was in addition to the two and one-half hours equally divided amongst the remaining co-defendants who have not appealed.) The Government was allotted two and one-half hours. (RIII 5696/10-19) In fact Weinstein took 1 hour 6 minutes, George Barnard 20 minutes (of his allotted hour), John Barnard 25 minutes, Knippel 20 minutes, Lassiter 26 minutes, and the Government a total, (for opening and closing), of 1 hour 21 minutes. (Supp. RI 79-80)

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j/ NOTE: All five appellants have raised this point: Weinstein's Specification of Error No. VIII; George Barnard's Specification of Error No. I; John Barnard's Specification of Error No. II; Knippel's Specification of Error No. II; and Lassiter's Specification of Error No. II. We combine our answer to all five appellants in this section.

It is axiomatic that the limitation of time for arguments of counsel is within the sound discretion of the trial judge. Butler v. United States, (C.C.A. 8, 1963) 317 F. 2d 249, 257, cert. den. 375 U.S. 838; Cases v. United States, (C.C.A. 1, 1942) 131 F. 2d 916, 925, cert. den. 319 U.S. 770, rhrg. den. 324 U.S. 889; United States v. Kay, (C.C.A. 2, 1939) 101 F. 2d 270, 272, cert. den. 306 U.S. 660; Capriola v. United States, (C.C.A. 7, 1932) 61 F. 2d 5, 11, cert. den. sub nom. Walsh v. United States, 287 U.S. 671. The only question here is: Was there an abuse of discretion? We think not.

Appellants essentially complain that more time was needed because of the number of witnesses, (109), number of defendants, (10), number of exhibits, (407), and a record of over 6000 pages upon a nine count indictment. Yet in Butler v. United States, supra, it was found to be no abuse of discretion to limit argument to a total of 15-1/2 hours for 30 defendants who went to trial on a 33 count indictment, a record of 14,373 pages with 140 witnesses and a "multitude of exhibits". Id. pp. 252 fn. 4, 257. And, as noted in Butler, the trial court's limitation of counsel for 43 defendants to a total of two hours for final argument was upheld in Capriola v. United States, supra, although there were 59 defendants who went to trial, (of whom 16 were dismissed by the court), and 109 overt acts.

It is true that in Capriola the record was devoid of any objection to the court's ruling on the time allotted and there was no assignment of error based thereon. However, the conjunctive nature of the court's holding makes it clear that this was an additional or alternative - not the sole - ground for denying the claim of an abuse of discretion.

It should be noted that there is no federal case of which we are aware where argument in excess of 20 minutes is found to be an unreasonable restriction upon time. It is further noteworthy that recent federal cases handle the matter quite summarily. See Hodge v. United States, (C.C.A. 5, 1959) 271 F. 2d 52, cert. den. 361 U.S. 961; Cases v. United States, supra. k/

In Parker v. United States, (C.C.A. 6, 1924) 2 F. 2d 710, relied on by Weinstein (Br. p. 145), the appellate court did not hold that argument limited to 20 minutes was an unreasonable restriction, as Weinstein would have us believe. (Br. p. 145). Reversal was ordered there because of argument and advocacy on the part of the trial judge, while charging the jury, "beyond the permissible limit." Id. p. 711.

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k/ Cf. United States v. Crosby, supra. 50 count indictment, 15 week trial, 9000 page transcript, Held: "the trial judge was acting completely within his discretion and in furtherance of his duty to expedite the trial when he cut off Mittleman's attorney after he had gone more than a half hour over his self-requested five hour summation period." Id. p. 944, (emphasis supplied).

Kolp v. United States, (C.C.A. 6, 1924) 2 F. 2d 953 is referred to in Capriola, supra, p. 11, as a case in which the appellate court held that a limitation of argument to 10 minutes was an abuse of discretion. However, a careful reading of Kolp indicates that the Sixth Circuit felt that a limitation of argument to 10 minutes would have been unreasonable, but that an extension of 5 minutes, for a total of 15 minutes, no objection appearing, would not have been.

We do not comment upon the many state cases cited in Weinstein's brief for the reason that the plenitude of federal authority on the subject establishes the federal rule - that with which we are here concerned.

In Butler, supra, the trial court allotted to counsel representing but one defendant an hour and 15 minutes, to counsel representing two defendants an hour and 15 minutes, to counsel representing three defendants one hour 30 minutes, to counsel representing six defendants two hours, and to counsel representing seven defendants but two and one-half hours. The court discussed the various possibilities of time allocation with the attorneys, as the trial court here attempted to do [187/] and, in Butler, the majority of counsel consented to the time allocation. (317 F. 2d at 257). To that extent Butler differs from the instant case. However, in this cause the trial court asked counsel for Weinstein how much time he wanted and received the reply "at least 45

minutes". (RIII 5593/25 - 5594/10) Weinstein was allotted one hour and, on advice of this, made no comment at the time. (RIII 5665/19-20)

Under all the circumstances present in this cause, and upon the authorities above referred to, we submit that the trial court did not abuse its admitted discretion in limiting argument of the ten counsel involved to a total of six hours.

We suggest that the reason modern authorities such as Butler, Crosby, Hodge and Cases, all supra, find no abuse of discretion in the curtailment of argument is because our modern courts recognize the validity of the old saw:

"No sinner is saved after the first ten minutes."

VIII. THIS CAUSE WAS PROPERLY IN THE FEDERAL COURT.

Appellant Weinstein's Specification of Error No. IX is that the matters involved were primarily of local concern. Unfortunately we cannot discern from Weinstein's brief in what respect there is alleged to be error, unless it be that the trial court erred in failing to grant his several motions for a separate trial. (See Br. pp. 150, 151, 154). That issue we have already laid to rest at pp. 57-62, supra, and no more need be said here.

If this Specification of Error is intended to contest the jurisdiction of the federal court in this cause Mr. Justice Whitaker seems to have answered that point quite succinctly. "The fact that a scheme may violate state laws does not exclude it from the proscription of the federal mail fraud statute, . . . " Parr v. United States, (1960) 363 U.S. 370, 389.

It may well be true, and if not it should be, that the matters here involved were of local concern. But appellant was charged with, and the evidence amply supports conviction for, violations of the federal mail fraud and conspiracy statutes. Title 18 U.S.C. Secs. 371, 1341. Since the gravamen of the offenses was an abuse of the mails it was primarily a federal matter, and properly prosecuted as such.

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GEORGE BARNARD'S MOTION FOR CONTINUANCE

Appellant George Barnard's Specification of Error No. II is that the trial court erred in denying his motion for continuance until he could be tried under an indictment charging violation of Section 1503, Title 18 United States Code. He alleges that the failure to grant this motion deprived him of his right to counsel.

Essentially appellant complains that because he was incarcerated during the course of trial, and for twelve days

before commencement thereof, he was unable to "prepare his defense." (Br. p. 21) Yet he was at liberty from January 26, 1961, (the indictment was filed January 20), until September 1, 1961 and thereafter was never denied the right to confer with his attorney, (appointed February 20, 1961), who was able to talk with him at all times.[188]

This court has already decided that appellant's contention has no merit. Spaulding v. United States, (C.C.A.9, 1960) 279 F. 2d 65, 66, cert. den. 364 U.S. 887. See also Joseph v. United States, (C.C.A. 9, 1963) 321 F. 2d 710, cert. den. 375 U.S. 977; Torres v. United States, (C.C.A. 9, 1959) 270 F. 2d 252, 253-5, cert. den. 362 U.S. 921.

Counsel for appellant admitted that he had been "diligently engaged in the preparation of the defense" for six to seven months prior to the trial, including a thorough analysis of the list of government witnesses furnished appellant by government counsel, and that the initial postponement from a May to September date, "was to give us more time to prepare." That he had done so finds strong support in the record for "his actions showed that he had spent a considerable amount of time on the law of the case for he had many comments and objections to make", Torres v. United States, supra, p. 255, and vigorously contested every step of the way leading to final disposition of the case. Avery v. Alabama, (1940) 308 U.S. 444, 450.[189] The time and effort expended

by counsel for appellant here, both in the seven months of preparation and the energetic participation at trial, make it clear that the constitutional guarantee of assistance of counsel was more than satisfied.

The motion for continuance is purely a matter within the discretion of the trial judge and ordinarily will not be reviewed. Avery v. Alabama, supra, p. 446; Joseph v. United States, supra, p. 713. We submit that there has been no abuse of that discretion in the instant case.

Since appellant's Specification of Error No. II goes to the exercise of the court's discretion at the time the motion to continue was made, subsequent events are immaterial. Accordingly we do not comment on appellant's paragraph C, (Br. pp. 21-22), except to say that the foregoing authorities are equally conclusive if it be deemed that appellant asserts error by reason of the trial court's denial of that particular ground for new trial, and to note that " . . . the mere fact that the government fails as to one or more counts does not mean that the indictment was improperly obtained or secured in bad faith." United States v. Bentvena, supra, p. 950.

X. KNIPPEL WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Appellant Knippel's Specification of Error No. III is that he was denied the effective representation of counsel when the trial court refused to permit a continuance upon the substitution of counsel at the start of trial.

Preliminarily we note thst appellant states that his "trial counsel was appointed after the jury had been selected and just previous to trial." (Br. p. 10) Only by use of the word "trial" can this statement come close to the fact. The fact is that appellant was represented by counsel, from the time of his arraignment on February 20, 1961 at all stages of the proceedings. After the empanelling of the jury there was a substitution of counsel, with appellant's consent. At the conclusion of the government's case there occurred still another substitution, again with appellant's consent. 190/

The issue here is whether or not appellant was deprived of the effective assistance of counsel because of the substitution, (with his consent), after the empanellment of the jury. For the reasons which follow we submit that the answer is - he was not.

Appellant had been represented by one Carskadon for almost seven months before trial commenced. Upon empanellment of the jury he was allowed to withdraw and Messrs. Atchison and Ransom, with appellant's consent, were appointed in his

stead. At the time of the substitution Carskadon volunteered his file and his assistance. After empanelling the jury on Thursday, September 14, court recessed until Monday, September 18. On Tuesday, September 19, court recessed early (approx. 3:30 PM) and did not reconvene until 9:30 AM Thursday, September 21. Atchison, one of the co-counsel appointed in substitution of Carskadon, was not without some independent knowledge of the case for his partner had already been working on Weinstein's defense.[191]

Joseph v. United States, supra, is the only one of the authorities cited by appellant which is of assistance in resolving the issue here. In Joseph the defendant was represented by counsel of his own choice at all relevant times in the district court, as was appellant here; and there, as here, the defense was vigorous and able. (Id. p. 711) Counsel for Joseph took the position that one week's preparation for trial of a case involving lengthy punishment was insufficient as a matter of law. This court did not agree and held that Joseph had had the effective assistance of counsel. Cf. United States v. Bentvena, supra, pp. 934-8; Gray v. United States, (C.A.D.C. 1962) 299 F. 2d 467, 468. We submit that the facts compel the same conclusion here.

Since United States v. Bergamo, (C.C.A. 3, 1946) 154 F. 2d 31, and United States v. Vasilick, (M.D. Penn. 1962) 206 F. Supp. 195, cited by appellant, are adequately distinguished by this court in Joseph, (see fn. 1, 321 F. 2d 712), we comment briefly only upon Releford v. United States, (C.C.A. 9, 1961) 288 F. 2d 298 and Maye v. Pescor, (C.C.A. 8, 1947) 162 F. 2d 641, also cited by appellant. In Releford this court reversed because the trial court had forced the defendant to trial with counsel not of his choosing and who was not even appointed to represent him. In Maye the court found no error in that the defendant had ample opportunity to consult with counsel before entering a plea of guilty. Palpably no comparable fact situation to that in the instant cause.

We believe most nearly analogous to the situation here presented is that found in Arellanes v. United States, (C.C.A. 9, 1962) 302 F. 2d 603, cert. den. 371 U.S. 930, where just prior to trial, counsel, who had represented Arellanes for almost seven weeks prior to trial, was permitted to withdraw and Arellanes proceeded without counsel. This court held that the trial judge "proceeded properly" in denying a further continuance at that time. (Id. p. 610). Cf. Bailey v. United States, (C.C.A. 9, 1960) 282 F. 2d 421, 427, cert. den. 365 U. S. 828; and Sanchez v. United States, (C.C.A. 9, 1962) 311 F. 2d 327, 332-3.

Glasser v. United States, (1942) 315 U. S. 60 and Powell v. Alabama, (1932) 287 U. S. 45, cited by appellant (Knippel Br. p. 10) are not in point. In Glasser, at the start of trial counsel for Glasser was appointed to represent a co-defendant, as well as Glasser, despite Glasser's objection and despite the fact the court was apprised of a possible conflict of interest between Glasser and the co-defendant. In Powell defendants had had no attorney named or definitely designated to represent them until the very morning of trial. No opportunity was given to investigate the facts and the representation was rather pro forma than zealous and active. 287 U. S. at 58. While the rule of these decisions is exemplary it has no application to these facts.

Under the facts of this case it can only be concluded that the constitutional guarantee of the effective assistance of counsel was, as with George Barnard, fully satisfied.

XI. THERE WAS NO ERROR IN THE DENIAL OF APPELLANTS' MOTION FOR NEW TRIAL BASED UPON THE GROUND OF ALLEGEDLY NEWLY DISCOVERED EVIDENCE.

Appellants George Barnard, John Barnard, Knippel and Lassiter each claim the trial court erred in denying their respective motions for new trial upon the ground of newly discovered evidence concerning the qualifications of two jurors who were empanelled to, and did, try the case. (Respectively Specifications of Error Nos. III, IV, IV and III)

The short answer to these contentions is that the trial court concluded that the alleged evidence was not "newly discovered" (Supp. RI p. 66/27-32), and properly so, having found that appellants either knew, or would have known upon the exercise of reasonable diligence, of the matters they alleged. 192/

Appellant "disputes the validity" of these findings of fact. (Br. p. 23).

> But it is not the province of this court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. (cites omitted) While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, (cites omitted), it should never do so where it does not clearly appear that the findings are not supported by any evidence.
> United States v. Johnson, (1946) 327 U.S. 106, 111-2. Cf. Gallegos v. United States, (C.C.A. 9, 1961) 295 F. 2d 879, cert. den. 368 U.S. 988; Apel v. United States, (C.C.A. 8, 1957) 247 F. 2d 277, 285.

Before demonstrating that the findings of fact are wholly supported by the evidence it should be noted that "In order to sustain a motion for new trial on the ground of newly discovered evidence, a defendant must make it satisfactorily appear that his failure to discover such was not due to lack of diligence on his part". Ferina v. United States, (C.C.A. 8, 1962) 302 F. 2d 95, 112, cert. den. 371 U.S. 819; United States v. Costello, (C.C.A. 2, 1958) 255 F.2d 876, 879,

cert. den. 357 U. S. 937; United States v. Soblen, (S.D.N.Y., 1961) 203 F.Supp. 542, 564, cert. den. 370 U. S. 944. Questions of credibility are clearly for the trial judge, United States v. Gantt, (C.C.A. 4, 1962) 298 F. 2d 21, 22, and there must be a showing in the record of facts from which the court can infer due diligence, and counsel's affidavit here, (Supp. RI pp. 1-4), does not constitute such a showing. Balestreri v. United States, (C.C.A. 9, 1955) 224 F. 2d 915, 917. Neither does the record.

The trial court could well have concluded that appellants knew of the facts as to which they complain, but it could hardly fail to conclude that they could have known had they exercised any effort at all, let alone reasonable diligence.[193] Under the circumstances the motion was properly denied.

As to the evidence, that which was developed at the hearing after remand, appellants either misconstrue its effect, or mistake its import, when they find it lacking to support the findings they contest. A short perusal of the transcript indicates that all the contested findings are amply supported.[194]

We do not comment on the several cases cited by appellants in support of these specifications of error for the reason that even the small portions quoted in appellants' briefs make it evident that they are not in point.

There is so little merit to these specifications of error that one cannot help but recall those aptly descriptive lines from Macbeth:

> : it is a tale
> Told by an idiot, full of sound and fury,
> Signifying nothing.
>
> Act V, Sc. 5, 11. 26-28

C O N C L U S I O N

Appellants had a fair trial. The record supports the verdicts in every respect, and the cause was submitted to the jury under correct instructions. We respectfully submit that the judgments of conviction should be affirmed as to each appellant.

DATED: SAN FRANCISCO, CALIFORNIA, MAY 7, 1964.

Respectfully submitted

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C E R T I F I C A T E

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A. LAWRENCE BURBANK
Special Assistant to the
United States Attorney

A P P E N D I X

APPENDIX

EXPLANATORY NOTE REGARDING TRANSCRIPT REFERENCES

Since there is a Transcript of Record (3 volumes), a Supplemental Transcript of Record (2 volumes) a Second Supplemental Transcript of Record, and a Supplemental Transcript of Record containing Transcript of Hearing after Remand (2 volumes), and since the pagination is not consecutive throughout these several volumes, the following abbreviations will be employed in this Appendix where appropriate. Transcript of Record: RI, RII, RIII, followed by page number and line; Supplemental Transcript of Record: Supp. R.I, Supp. R. II, followed by page number and line; Second Supplemental Transcript of Record: 2 Supp. R., followed by page number and line; and Supplemental Transcript of Record containing Transcript of Hearing after Remand; Tr. Hrg. I, Tr. Hrg. II, followed by page number and line.

TRANSCRIPT REFERENCES

Reference Number	
1.	RIII 785/7-788/8; 1113/12-25; 5391/13-23.
2.	RIII 2315/17-2316/12; 2317/15-25; 2318/4-5; 2486/20-23; 2497/7-9; 2498/14-20; 5375/20-5376/7; Exs. 85, 86, 88A, 88B, 88C.
3.	RIII 2317/16.
4.	RIII 2340/19; 2344/7-13; 2355/21-25.
5.	RIII 2340/19-22; 2366/8-2367/20.
6.	RIII 2343/4-9; 2395/5-6.
7.	RIII 2343/4-16; 2365/11-16.
8.	RIII 4442/19-4443/24; Ex. 471 pp. 5,6.
9.	RIII 4444/5-11.
10.	RIII 2408/23-2409/3; 5420/6-19; Ex. 80B.
11.	RIII 2316/20-24; Ex. 85.
12.	RIII 2535/10-12; 2539/1-3; 2539/10-11; 2541/5; 2547/21-23; 5417/18-20.
13.	RIII 5376/16-20; 5398/20-5399/16; Exs. 89, 510.
14.	RIII 2527/16-22.
15.	RIII 2739/1-11; 2847/1-16; Ex. 88J.
16.	Exs. 87, 88 p. 5/18-23; 88 p. 13/18-19; 88 p. 25/16-21; 88A, 88B, 88H, 88I.
17.	RIII 1102/22; 1104/3-6; 2317/22; 4602/7-10; 4740/23-4742/18; 5262/17-21; 5287/8-9; Ex. 98 p. 10.
18.	RIII 5287/13-5288/10; Ex. 98 p. 10.

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Reference Number	
19.	RIII 5229/9-5230/7; 5316/17-5317/21; Ex. 97 p. 14; Ex. 98 p. 4-5.
20.	RIII 4602/7-18; 4604/23-4605/11.
21.	RIII 4553/16-25; 4742/22-25; 4746/11-17; 4750/1-10; 5231/20-5232/13; 5246/2-8.
22.	Exs. 108, 109, 110, 110A, 110B, 110C, 485A, 485B, 485C, 485D.
23.	RIII 4962/19-22.
24.	RIII 5002/1-24; Exs. 108, 109, 110, 110A through 110HH, 500A through 500H.
25.	RIII 971/1-7; 985/1-986/2; 2741/25-2743/17; 2751/1-16; 4752/13-18; 4759/21-22; 5369/8-9; 5391/5-6; 5391/13-20; 5449/21-5450/6; 5454/2-5455/15; Exs. 21A through 21L, 25, 26, 94, 95, 96, 96A.
26.	RIII 2554/8-2555/20; 2560/23-2561/3; 2565/22-2566/18; 2567/22-2568/6; 4748/20-4749/6; Exs. 92, 92A, 93, 93A.
27.	RIII 759/2-12; 760/24-761/8; 779/5-7; 780/11-781/19; 785/19-786/18; 788/1-8; 1099/22-1100/15.
28.	RIII 309/3-21.
29.	RIII 884/13-886/11; 889/12-22; Exs. 5, 10, 11.
30.	RIII 883/7-15; 894/14-895/1; 896/11-897/18; 3396/2-13; 5068/20-22; Exs. 4, 12, 13, 155J.
31.	RIII 755/22-756/14; 757/17; 758/3-4; 903/2-16; Exs. 4, 15, 16.
32.	RIII 156/14-158/16; 224/18-25; 225/23-226/14; 228/7-229/18; 238/5-239/25; 243/6-25; 244/25-245/14; 597/13-598/15; 766/1-5; 760/21-761/8; 1093/14-1094/13.

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33.	RIII 158/13; 593/4-10; 756/2-6; 1086/2-6; Ex. 402.
34.	RIII 158/15-16; 225/8-19; 247/5-6; 592/19-25; Ex. 402.
35.	RIII 158/11-22; 298/15-20; 607/13-22; 608/13-18; 756/7-10; 764/12-765/1; 1088/12-17; 1100/24-25.
36.	RIII 253/1-5; 461/25-462/15; 604/1-3; 606/15-19; 611/9-612/4; 689/1-4.
37.	RIII 254/3-6; 612/7-9.
38.	RIII 255/3-22; 441/11-16; 444/2-5; 451/25-452/1; 610/9-12; 766/16-25.
39.	RIII 256/2-257/17; 259/9-15; 262/6-263/13; 609/2-610/1; Ex. 5.
40.	RIII 264/2-266/15; Ex. 5.
41.	RIII 292/10-293/20; 295/1-17; 608/7-9; 610/3-4; 615/8-16; 616/25-618/14; 658/22-25; 707/8-13; 717/9-16; 4373/19-4374/13; 267/2-7.
42.	RIII 624/13-625/7.
43.	RIII 283/18-284/5; 465/2-467/5; 4709/19-20; 4710/22-23; 5164/20-22.
44.	RIII 273/14-276/16; 917/19-920/2; 927/13-17; 934/4-935/2; 936/19-938/7; 959/16-968/17; 4697/15-16; Exs. 6, 7, 16, 18, 19, 20A through 20M.
45.	RIII 644/23-645/5.
46.	RIII 282/19-284/11; 284/12-15; 287/24-288/3; 630/6-631/10.
47.	RIII 4711/15-4712/20; 5165/14-17; Exs. 147B, 488; 4709/21-4711/10; 5153/5-5155/12.

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48.	RIII 5163/8-5164/13; 5165/14-22; Exs. 18, 19, 147A.
49.	RIII 1010/6-7; 5164/12-13; 5627/24-5628/24; 5638/21-5639/9.
50.	RIII 913/1-4; 937/2-10; 954/9-14; 5636/9-15.
51.	RIII 593/4-6; 756/2-4; 1076/10-13; 1086/5-6; 1410/20-22; 1411/16-19; 1435/4-6.
52.	RIII 1119/8-1120/7; 1120/24-1122/15; 1420/4-1422/13; 1424/18-23; 1435/4-6.
53.	RIII 1053/6-1054/1; 1077/12-25; 1410/25-1411/15; 1419/1-12; 1421/5-1422/13; 1438/5-25; 1730/8-23; 1801/5-7; Exs. 32A, 32B.
54.	RIII 1738/22-1739/14; 1742/23-1743/16; 1749/21-1751/23; 1819/4-6.
55.	RIII 1742/12-1743/10.
56.	RIII 1750/1-1752/7; 1787/2-25; 1795/6-10.
57.	RIII 1549/13-1551/8; 1554/2-1555/22.
58.	RIII 1054/8-10; 1425/25-1426/4; 1542/15-21; 1563/8-11; 1730/11-14.
59.	RIII 1440/9-1441/1; 1479/5-22; 1542/2-1543/13; 1730/8-1731/23.
60.	RIII 1427/8-21; 1428/2-25; 1440/9-1441/1; 1479/23-1480/25.
61.	RIII 3487/13-3491/25; 3494/1-12; 3570/20-24; 3579/22-3583/12; 3590/7-18.
62.	RIII 1422/11-25; 1476/7-10; 1542/9-11; 1576/10-25; 1659/1-14; 1660/6-1662/22; 1733/20-1734/1; 1740/3-11; Ex. 420.

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63.	RIII 1576/10-13; 1663/10-18; 1675/11-15.
64.	RIII 1567/6-19; 1675/16-20.
65.	RIII 1753/24-1755/25.
66.	RIII 1595/4-12; 1770/10-19.
67.	RIII 1568/3-10; 1571/3-14; 1572/2-7; 1756/25-1757/3; 1796/6-8.
68.	RIII 1520/20-25; 1591/12-1595/12; 1761/13-20; 4839/13-17.
69.	RIII 1763/17-1765/16; 1771/8-18; 1850/21-1851/11; Exs. 424A through G.
70.	RIII 1593/3-7; 1594/16-18; 1597/1-25; 1598/12-15; 1598/24-1599/2; 1599/11-19; 1600/7-10; 1681/2-1682/10; 1683/18-1684/25; Exs. 421A through H.
71.	RIII 1768/13-1770/4.
72.	RIII 1430/4-16; 1468/5-8; 1470/24-1471/3; 1496/18-1497/20; 1499/5-15; 1501/7-1502/6; 1505/5-1506/23; 1524/13-1525/8; 1525/23-1527/24; 1701/12-19; Exs. 27, 28, 29, 30, 34B, 38, 38A, 53, 54, 55, 56, 57, 57A.
73.	RIII 1430/4-25; 1459/14-1462/13; 2317/22.
74.	RIII 1431/5-1433/11; 1462/1-13.
75.	RIII 1133/25-1134/5; 1160/16-1161/5; 1176/3-1177/3; 1178/7-1179/9.
76.	RIII 1600/18; 1602/21; 1603/19-1604/9; 1772/3-18; 1849/2-7; 1852/6-8; Exs. 35, 35A, 36, 37, 39 through 50.
77.	RIII 339/18-19; 341/17-342/17; 349/9-23; 350/8-13; 351/12-352/25;

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78.	RIII 3235/2-25; 3248/17-19; 3254/5-7; 3256/8-13.
79.	RIII 240/13-14; 792/7-18; Deegan: 339/18-19; 341/17-343/25; 348/1-350/3; 351/12-352/25; Kerr: 3235/2-3236/5; 3248/14-19; 3249/15-21; 3254/5-3256/13; 3257/24-3260/22; Walker: 3058/19-3060/17; 3079/1-13; 3080/23-3081/10.
80.	RIII 349/9-23; 350/8-13; 351/12-15; 352/14-25; 3055/3-18; 3056/16-3057/9.
81.	RIII 3057/10-16; 3061/21-3062/13; 3092/10-20; 3276/4-15; 3306/8-25; 3325/6-13; 3326/8-10; 3503/20-3505/1; Exs. 111, 112, 113, 115, 116, 122, 123, 124, 125, 126, 127, 128.
82.	RIII 3114/1-20; 3115/5-3117/17; 3129/15-3130/6.
83.	RIII 3117/18-3119/14; 3121/24-3122/5; 3123/2-3125/1.
84.	RIII 3122/9-21; 3125/2-6.
85.	RIII 3224/9-21; 4839/15-17; 5116/8-5118/15; Exs. 111, 112, 113.
86.	RIII 3129/15-3130/6; 3155/18-3157/4; 3225/9-14; 3269/9-17; 5014/10-13; 5028/5-8.
87.	RIII 3226/13-3227/6; 3270/19-25; 3272/5-8; 5119/21-5121/5; Exs. 158A, 158B.
88.	RIII 3130/7-22; 3131/25-3132/16; 3137/19-23; 3159/7-22; 3162/3-5; 3163/1-3167/8; 3169/15-3170/2; 3172/14; 3199/2-3; Exs. 443A through D.
89.	RIII 3132/17-3134/14.

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Reference Number	
90.	RIII 3172/18-3173/24; 3174/14-16; 3198/13-22; 3199/2-22; 3210/11-13.
91.	RIII 3134/20-3136/17; 3172/6-17; 5263/17-20; 5327/8-5329/10.
92.	RIII 3136/18-3137/12; 3157/14-18; 3160/18-3162/2; 3162/23-3167/18; 3180/11-12; Exs. 443A through D.
93.	RIII 3137/24-3138/8; 3178/9-20.
94.	RIII 5465/21-5466/22.
95.	RIII 3199/23-3200/23; 3202/6-20.
96.	RIII 3209/23-3210/6.
97.	RIII 3186/12-3187/10; 3189/9-15; 3213/15-25; Ex. 445A.
98.	RIII 3213/6-20; Ex. 445B.
99.	RIII 3187/11-23; 3215/1-3216/15; Ex. 142.
100.	RIII 3275/18-3276/15; 3296/6-18; 3301/18-3302/8.
101.	RIII 3297/13-3299/9; 3318/1-6; 3322/6-23.
102.	RIII 1968/16-23; 1969/5-1970/12; 1975/2-6; 1975/23-25; 2054/3-16.
103.	RIII 1894/18-1895/7; 1937/21-23; 1962/1-12; 1964/6-20; 1965/4-10; 1966/11-25; 1967/24-1969/17; 3869/18-3870/16.
104.	RIII 1896/2-1898/8; 1898/24-1899/18; 1963/19-23; 1978/2-1979/16.
105.	RIII 1938/2-3; 1947/8-15; 1948/3-12; 1979/10-1980/5.

TRANSCRIPT REFERENCES

Reference Number	
106.	RIII 1893/13-1894/3; 1904/5-9, 1939/5-14; 1940/10-19; 1949/6-10; 1979/25-1980/3; 1981/20-25; 1982/1-14; 1987/17-1988/8; 1991/21-1992/11; 2121/17-24; 2171/15-2172/12; Ex. 66.
107.	RIII 2193/1-10; 3807/18-23; 3808/19-3811/16; 3823/23-3824/21; 3833/9-3834/22; 3835/2-3; 3839/8-17; 3840/7-12; 3844/18-21; 3846/23-3847/6; Exs. 78, 458.
108.	RIII 1893/13-1894/3; 1903/11-23; 1998/11-14; 1999/5-15; 2015/25-2016/22; 2048/4-12; 2080/18-2081/12; 2082/17-2083/4; 2158/13-2160/14.
109.	RIII 1941/12-18; 1952/21-25; 1953/18-22; 2024/7-18; 2158/13-2160/14.
110.	RIII 2173/12-2175/6; 2178/22-2179/20; Ex. 65.
111.	RIII 1941/19-21; 2127/10-2128/10; 2128/23-2129/14; 2131/1-22; 2133/20-2134/2; 2188/18-2189/22; 2227/8-2229/3; 2240/23-2241/4; 2245/8-2247/1; 2250/15-17; 2786/2-2788/2; Exs. 22, 71, 72, 73.
112.	RIII 1044/22-1047/3; 1049/11-17; 5006/6-5007/8.
113.	RIII 2551/12-19; 2552/4-25; 2740/17-18; 2741/1-5; 2742/22-2743/17; 2745/18-19; 5367/5-6; Exs. 95, 96.
114.	RIII 1941/22-1943/13; 2238/19-2239/10; 2248/8-15; Exs. 67, 68, 79, 80.
115.	RIII 1874/1-15; 1876/7-13; 1876/21-1877/16; 1877/23-1878/7; 1888/25-1889/19; 1944/14-1945/14; Exs. 61, 62, 63, 64.
116.	RIII 2317/15-17; 2838/13-2839/1; 2845/17-23.

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Reference Number	
117.	RIII 2797/22-2798/9; 2802/18-2803/11; 2839/2-5; 2845/24-2846/2.
118.	RIII 2804/2-18; 2805/7-13.
119.	RIII 2795/1-2796/4; 2799/3-22; 2818/2-11.
120.	RIII 2794/19-25; 2796/6-13; 2850/6-21; 2851/18-2852/3;3360/18-20; 3362/3-12; 3393/10-3394/4; 3394/13-3395/1; 3402/24-3403/7.
121.	RIII 2849/25-2850/1; 2852/14-2853/22; 2856/25-2857/4; 2897/11-15; 3347/7-21;3351/8-17; 3362/22-3363/11; 3380/9-21; 3392/25-3393/6; 3395/4-10; 3413/1-4; 3436/12-16; 3438/3-4; Ex. 52
122.	RIII 2794/3-16; 2797/15-17; 2805/23-2806/9; 2849/4-2850/5;3355/23-3356/14; 3392/12-3393/6; 3438/3-4; 3446/17-18.
123.	RIII 2174/3-4; 2175/7-2176/14; 2177/16-17; Exs. 88A, 88B, 88C.
124.	RIII 2860/23-24; 3396/4-8; 3396/17-25; 3397/21-25; 3459/23-3460/5.
125.	RIII 884/13-886/11; 889/12-22; 894/19-895/1; 896/11-897/18; 3396/2-13; Exs. 4, 5, 10, 11, 12, 13.
126.	RIII 2860/17-2861/10; 3359/5-12; 3359/25-3360/13; 3397/15-20; 3398/8-11; 3399/3-16; 3401/4-24; 3436/17-19.
127.	RIII 2808/14-2809/10; 3367/13-22; 3402/11-16; 3412/17-19.
128.	RIII 2800/20-2802/6; 2832/1-13.
129.	RIII 2866/19-24; 3362/13-19; 3404/20-3405/9.

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Reference Number	
130.	RIII 2867/6; 2904/8-10; 3368/7-15; 3373/5-8; 3405/13-18; 3406/4-6; 3509/18-3510/2.
131.	RIII 2891/13-24; 2899/3-7; 2899/20-25; 2902/20-21.
132.	RIII 2900/4-25; 2902/24-2904/10.
133.	RIII 2800/20-24; 2867/8-2868/4; 3103/23-3104/18; 3368/16-3369/10; 3406/9-3407/4; 3509/18-3510/17; 3534/9-3535/4; 3536/18-25; 3537/7-24; Exs. 131, 132, 133, 134, 136, 137, 139, 140, 140A.
134.	RIII 3408/11-3410/6; 3410/16-20; 3413/9-3414/1; Ex. 129.
135.	RIII 3413/18-3414/1; 3477/21-3478/25; 3479/10-12; 3480/17-22; 3481/ 3-24; Ex. 129.
136.	RIII 3410/21-3411/6; 3411/17-3412/16; 3414/4-14; 3416/6-19; 3453/22-3456/17; Ex. 130.
137.	RIII 2868/17-2869/1; 2870/25-2871/3; 2884/23-2885/7; 2911/9-2913/6.
138.	RIII 2869/2-10; 2870/15-2871/17; 2999/3-25; 3000/19-3001/2; 3001/19-3002/1; Ex. 135.
139.	RIII 3370/4-18; 3371/20-24; 3431/2-3433/24.
140.	RIII 299/2-7; 299/24-300/9; 641/15-642/20; 2288/1-5.
141.	RIII 299/24-301/4; 303/5-20; 479/23-480/8.
142.	RIII 300/17-18; 300/25-301/10; 303/5-20.
143.	RIII 1221/12-1222/20; 3628/1-3630/14.
144.	RIII 1187/11-1188/4; 1188/23-25; 1189/17-20; 1196/20-22; 1197/6-1198/6; 1205/13-24; 1368/21-1369/25; 1370/1-8.

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Reference Number	
145.	RIII 1209/1-11; 1214/2-5; 1350/25-1351/1; 1358/13-1359/7; 1370/9-22; 1372/24-1373/22; 1374/19-1375/21.
146.	RIII 1206/14-15; 1208/4-12; 1375/22-1376/1; 1376/22-1377/4; 1399/16-20.
147.	RIII 1010/6-7; 1011/11-20; 1022/19-21; 3002/25-3003/4; 3022/11-17; 3030/24-25; 3031/10-15.
148.	RIII 1243/20-1245/1.
149.	RIII 311/17-313/23 ; 315/1-4; 475/19; 476/24-25; 478/10-11; 543/18-19; 545/22; 551/19; 1246/22-24; 4703/4-8.
150.	RIII 1246/20-1249/18.
151.	RIII 4714/15-21; 5165/14-22; Ex. 147B.
152.	RI 206; RIII 1251/7-1252/6.
153.	Mailings: a) Demand letters from attorney to insurance company: RIII 1526/6-16; 1527/17-24; 2133/20-2134/2; 2243/22-2244/15; 2266/21-2267/5; 3511/17-3512/7; 3534/16-3535/8; Exs. 22, 53, 139; b) Copies of complaint and summons sent to DMV: RIII 964/5-24; 966/21-967/8; 967/25-968/17; 985/1-21; 986/12-21; Exs. 20, 20D, 20H, 20L, 21C, 21D, 21H, 21L; c) Copies of complaint and summons sent insurance company: RIII 923/13-22; 1497/13-20; Exs. 17, 34B; d) Copy of complaint and summons to insured: RIII 2711/12-16; 2751/1-16; Exs. 25, 26; e) Drafts to pay claims: RIII 1503/8-14; 3277/8-11; 3612/6-3613/2; Exs. 34C, 123, 132, 134; f) Application for insurance policy: RIII 3105/2-3; Ex. 140; g) Application to change policy to add car: RIII 905/18-22; 911/8-21; 914/9-10; Ex. 15; h) Request for settlement checks: RIII

Reference Number

1504/4-12; Ex. 34C; i) Claim forms: RIII 2729/9-23; Ex. 88F; j) Return of claim forms: RIII 2730/9-12; 2731/19-23; Ex. 88G; k) Release of claims: RIII 927/6-24; 934/4-21; Ex. 18; l) Report of investigation: RIII 933/9-13; m) Contact with out of state insured: RIII 3187/11-14; 3215/1-3216/15; n) Correspondence between attorneys: RIII 3187/15-24; 3215/1-14; Exs. 142, 445A, 445B; o) Doctors reports to attorneys: RIII 4270/11-17; 4391/7-18; 4465/12-18; 4514/9-16; Exs. 466, 467, 468, 469, 477A, 477B, 478A, 478B, 479, 480, 481, 482A, 482B, 482C; p) Standard practice to use mails: RIII 1514/2-9; 2267/10-25; 2587/11-2588/2; Exs. 22, 53, 54, 55, 56.

153A. RIII 2926/3-4; 2928/19-2930/6; 2957/3-2958/22.

154. See Reference Numbers 1, 2, 3, 4, 5, 6, 7, 8, 10.

155. See Reference Numbers 1, 6, 10, 11, 12, 13, 14, 15, 21, 22, 24, 25.

156. See Reference Numbers 21, 22, 38, 43, 69, 70, 86, 87, 91, 92, 147.

157. See Reference Numbers 30, 60, 61, 62 And RIII 1044/22-1046/17; 2279/2-3; 2509/14-17; 4772A/9-22.

158. See Reference Numbers 141, 142.

159. RIII 267/23-268/4; 269/12-19; 425/22-426/9; 1659/1-14; 1660/6-1662/22; 4454/9-22; Exs. 147A, 147B, 420.

160. RIII 615/5-16; 717/11-16.

161. See Reference Number 22.

162. See Reference Numbers 69, 70, 71.

163. See Reference Numbers 39, 40, 41, 42.

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Reference Number	
164.	See Reference Numbers 1, 10, 11, 12, 13, 14, 15, 25 and RIII 1044/22-1046/17.
165.	See Reference Numbers 41, 48; Exs. 1 p. 2, 11.16-28; 2 p. 2, 11. 15-27; 488.
166.	See Reference Number 45; RIII 630/6-631/10; 4701/7-12.
167.	See Reference Numbers 36, 62, 66.
168.	See Reference Numbers 68, 71, 90, 94, 95, 96, 97, 98, 99; RIII 5014/10-13; Exs. 142, 443C, 445A, 445B.
169.	See Reference Number 71; RIII 5014/10-13.
170.	See Reference Numbers 17, 19, 20, 21, 22, 24; RIII 4995/4-4996/19.
171.	See Reference Numbers 73, 74, 110.
172.	See Reference Numbers 136, 149.
173.	See Reference Numbers 103, 104, 105, 106, 107.
174.	See Reference Numbers 143, 144, 145, 146, 148, 150.
175.	See Reference Numbers 53, 75 and RIII 1421/14-22.
176.	See Reference Numbers 77, 80, 83, 85, 87.
177.	See Reference Numbers 94, 95, 99; Ex. 443C.
178.	See Reference Numbers 102, 103, 104, 105, 106.
179.	See Reference Numbers 143, 144, 145, 146.
180.	RIII 4016; 4598/13-14; 5260; 5463.
181.	RI 14-20; 37; 80; 211; RIII 3686; 3722; 5680; 5689.

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182. RIII 484/4-487/5; 523/10-530/17; 538/1-541/3; 5181/18-5184/24.

183. RIII 487/10; 489/18-19; 502/12-15; 503/18-20; 510/19-20; 512/11-15; 514/6-10; 518/5-21.

184. Concealment evidence: a) Instructions to fake injury: RIII 249/17-24; 267/2-7; 292/10-295/17; 616/25-617/24; 679/21-680/4; 701/12-24; 704/3-9; 765/20-766/5; 781/3-782/7; 1126/16-1127/4; 1733/20-1734/1; 1813/15-1814/22; 3122/9-21; 3362/13-19; 3404/3-9; 3404/25-3405/3; b) Instructions to lie down again at scene: RIII 3367/17-22; 3402/11-16; 3447/2-15; c) Instructions to quit work: RIII 615/5-16; 717/11-16; d) Instructions to damage vehicle: RIII 257/13-17; 446/4-17; 1948/10-12; 2852/16-19; 3362/22-3363/4; 3380/9-14; 3394/13-21; e) Instructions as to report of cause: RIII 764/9-765/1; f) Instructions to keep quiet: RIII 642/12-20; 1244/11-1245/1; 1375/16-21; 1431/23-1432/25; 1756/25-1757/3; g) Instructions to get out of town: RIII 300/6-18; 1251/25-1252/6; 1376/2-13; 1392/20-23; h) Instructions to conceal method of referral: RIII 461/25-462/15; 566/21-567/8; 1770/10-19.

185. See Reference Numbers 143, 150.

186. Ex. 147B.

187. RIII 5199/3-10; 5593/6-8; 5594/19-5595/2.

188. RI 206, 207, 208, 210, 211, 213, 214, 218; RII 271, 274, 275, 276, 277; RIII 3703/15-24; 3704/8-14. (See also Reference 189.)

189. RIII 5937/7-22; Supp. RII 4/20-5/6; 23/19-24/2; 2 Supp. R 2/13-24; 20/20-21/3.

TRANSCRIPT REFERENCES

Reference Number	
190.	RI 48, 49, 206, 208, 209, 217, 219; RIII 39/12-18; 52/1-2; 65/12-68/25; 69/7-10; 3667/4-25.
191.	See Reference Number 190 and RI 219, 220; RIII 81/13-17; 85/20-86/3; 89/3-4; 93/6-20; 368/16-20; 382/4-383/7.
192.	Supp. RI 65/17-66/9. See also Court's Opinion, Supp. RI pp. 52-54.
193.	Tr. Hrg. I 43/15-16; 221/8-24; 223/22-224/18; 249/13-250/15; Tr. Hrg. II 292/20-294/23; 311/2-312/8. Note. Trial Ct's Opinion, Supp. RI 53/3 contains citation to partial transcript p. 18. The material is found in Tr. Hrg. 43/15-16.
194.	Evidence to Support Contested Findings of Fact:

Finding III: Tr. Hrg. I 62/1-10 (June, 1962; Tr. Hrg. I, 1); 70/10-15; 71/3-8; 71/22-72/16.

Finding V: Tr. Hrg. I 137/7-9; 139/18-141/13; 143/11-15; 147/11-150/23; 165/8-166/3.

Finding VI: Tr. Hrg. I 134/13-136/13; 149/24-150/23; 205/23-206/18.

Finding VII: RIII 6273/18-6274/18; 6276/8; 6277/16-24; 6279/1-2.

Finding VIII: Tr. Hrg. I 43/15-16; 221/8-24; 223/22-224/18; 249/13-250/25; Tr. Hrg II 292/20-294/23; 311/2-312/8.

Finding IX: RIII 6273/18-6279/2; Supp. RI 2/25-27; 4/22-23.

Finding XI: Tr. Hrg. I 249/13-250/25; Supp. RI 65/27-30 (Uncontested Finding X).

TRANSCRIPT REFERENCES

Reference Number	
	Finding XII: Tr. Hrg. I 197/7-15; 249/13-250/15.
	Finding XIV: Tr. Hrg. I 71/22-25; 72/6-10; 205/23-206/2.
	Finding XV: RIII 6273/18-6279/2; Supp. RI 2/25-27; 4/22-23; 65/27-30; Tr. Hrg. 249/13-250/25

CERTIFICATE OF SERVICE BY MAIL

M A Y 7, 1964

I HEREBY CERTIFY that on this day there was mailed, via Air Mail, with postage thereon fully prepaid, three (3) copies of Consolidated Brief of Appellee to each of the following at the addresses indicated:

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I FURTHER CERTIFY that the above are the last known addresses of said counsel for appellants and there is at each of said places a delivery service by United States Mail from said Post Offices.

A. LAWRENCE BURBANK

A. LAWRENCE BURBANK
Special Assistant to the United States Attorney, District of Oregon.

No. 17762

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

See Vol. 3185

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT PAUL JOHN CARBO'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

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PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT PAUL JOHN CARBO'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellant Paul John Carbo petitions the Court for a rehearing of its judgment of February 13, 1963, affirming the judgment as to him and pursuant to Rule 23(5) of this Court, respectfully suggests that the rehearing be en banc. Said petition and suggestion are made on the following grounds:

1. The Court's view (slip opinion, 22-27) of the law as to the use to which the jury may put a declaration of an alleged co-conspirator as against a non-present defendant is an important question which, at the least, has never been decided by the Supreme Court or, at the most, is in conflict with the applicable decisions of that Court and the generally prevailing view of the law. Under such circumstances, a hearing en banc should be held.

2. In its opinion (p. 27, f.n. 26) the Court says that an earlier decision of this Court (Oras v. United States, 67 F.2d 463) is distinguishable from the instant case on the non-present declaration question and states, without mentioning them specifically (save Lutwak v. United States, 344 U.S. 601) that other cases cited by appellant, including those of this Court (e.g. Dolan v. United States, 123 Fed. 52) are likewise distinguishable. We submit that the view of the law as expressed in the decision in the instant case is contrary to that as expressed in the previous cases of this Court and that in effect, the instant decision sub silentia overrules the earlier cases. Not only do we urge that the earlier cases are correct but, in any event, if earlier cases of this Court are to be overruled or disapproved, this should be done, as we understand the procedure, only after consideration by the whole Court en banc.

3. The objection as to the evidence of Sica's (as well as Dragna's) reputation was likewise made by this defendant and the assignment of error in Sica's brief adopted by him. The Court's opinion (p. 30) reads as though this defendant did not object or was not complaining of the admission of this evidence. He did and does because of its use against him.

4. This is also true as to the evidence of Stanley as to Calla (slip opinion, p. 37).

5. The Court upholds (p. 39) on the theory of the state of mind of Leonard, the admissibility of the testimony of Nesseth and McCoy as to what Leonard told them outside the presence of any defendant as to what this defendant is supposed to have told

Leonard. Actually the objection was (Carbo, Op. Br. 65) to Nesseth's and McCoy's testifying to what Leonard said Gibson and Palermo (as well as Carbo) are supposed to have told Leonard. In any event, though objected to, the evidence was not admitted at the trial on the theory of Leonard's state of mind (Carbo, Rep. Br. 55-57). On the contrary, it was admitted generally and for all purposes, including for the truth of the purported statements of the non-present defendant (Carbo, Rep. Br. 49-54, 57, 60-61). As this Court seems to agree (p. 39), the admissibility of that evidence for the truth thereof is improper; yet it was so admitted. The prejudice to this defendant cannot be gainsaid.

6. In its ruling on the Rule 25, F. R. Cr. P. -- successor judge - question, this Court said (p. 46): "We should be inclined to emphasize demeanor rather than credibility as the vital factor upon the question here presented." If this be so, then in this case, where the conflict of evidence is so marked and where the credibility of the prosecution's chief witnesses is so seriously in issue, the demeanor of the witness becomes crucial. The successor judge, no more than this Court, was in no position to make that indispensable value judgment which could come only from seeing the witnesses. While, as appellant views the law, it is, or should be, "that where credibility of government witnesses is a serious issue it must follow ipso facto that a new trial must be held" (slip opinion, p. 46, emphasis added), that broad proposition need not be determined now; only the instant case need be decided here. This Court's reliance (p. 47) on what the successor judge said as to

corroboration does not solve the problem. It is, we respectfully submit, a boot-strap argument for, in assessing the credibility of the corroborating witnesses, it was necessary to take into consideration the demeanor of those witnesses, a function the successor judge could not perform. Nor does the trial judge's charge to the jury give assistance. It is that judge's judgment to which defendant was entitled on the motion for new trial. Since it was impossible, because of the death of the trial judge, to give the defendant the benefit of that judge's judgment, the remedy is not to deny the defendant, but, consonant with the protection the Rule seeks to give the defendant, to grant him a new trial.

In any event, the question is so important, the Court en banc should consider it.

7. The Court considered against this defendant evidence which cannot be considered against him. The Court states (slip opinion, p. 4): "Carbo, with a background of underworld association, emerges as the leader of the conspirators." With due respect, there is no permissible evidence in the trial record of this case which supports that statement. If, in making that appraisal, the Court was relying upon the testimony of Gibson, which appears to be the case, judging from the rest of the paragraph of which the sentence above quoted is the first sentence, either before the Kefauver Committee or in Court concerning that testimony, the Court cannot so rely because as the trial court recognized, and so instructed the jury (RT 2692-3, 5050, 5130), that testimony was inadmissible, and was not to be considered, against this nor any

defendant other than Gibson. And, of course, any information outside the trial record of this case cannot be considered here.

CONCLUSION

The petition for rehearing should be granted and the suggestion that the rehearing be en banc should be accepted.

Respectfully submitted,

WILLIAM B. BEIRNE

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Attorneys for Appellant
PAUL JOHN CARBO

CERTIFICATE

I certify that the above Petition for Rehearing is, in my judgment, well founded and that it is not interposed for delay.

/s/ William B. Beirne

WILLIAM B. BEIRNE

No. 17,762.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

PAUL JOHN CARBO, et al.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From the United States District Court for the Southern District of California.

PETITION FOR REHEARING OF FRANK PALERMO, APPELLANT.

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TABLE OF CASES CITED.

PETITION FOR REHEARING OF FRANK PALERMO, APPELLANT.

To the Honorable Stanley N. Barnes, Oliver D. Hamlin, Jr. and Charles M. Merrill, Judges of the United States Court of Appeals for the Ninth Circuit.

Comes now Frank Palermo, appellant in the above entitled matter, and respectfully prays the Court to grant a rehearing.

I. This appellant contended that evidence was illegally obtained by the use of an induction coil device affixed to a telephone, through which a conversation between the appellant Palermo and Leonard was intercepted and a recording made. It was contended by appellant that the admission of the recording was also improper.

a. The Court treated the case as ruled by *Rathbun v. United States,* 355 U. S. 107 (1957). This, however, was error because in *Rathbun,* the sole question before the United States Supreme Court and the sole question decided was whether the contents of a conversation *overheard* on a *regularly* used telephone *extension* with the consent of one party to the conversation were admissible. The Supreme Court observed that the extension was not installed for the purpose of obtaining the evidence but was a regular connection previously placed and normally used.

b. The coil induction device effects an *interception,* and it was so held in *United States v. Stephenson,* 121 F. Supp. 274 (D. C. 1954), which is in conflict with this Court's decision. So also, this Court's decision conflicts with *Schwartz v. Texas,* 344 U. S. 199 (1952) which was not overruled by *Rathbun, supra.*

c. The recording was in violation of the Federal Communications Act, which was called to the attention of the district court and this Court. The Commission regards the use of an induction coil as prohibited by its Orders. See

Report of the Commission, In the Matter of Use of Record ing Devices in Connection with Telephone Service, adopte March 24, 1947, Docket No. 6787, 11 F. C. C. 1033, an orders dated November 26, 1947, and May 20, 1948, 1 F. C. C. 1005, 1008. (See p. 47, Reply Brief of Appellan Carbo, referring to the latter orders.) *Rathbun v. Unite States, supra,* cited by this Court in its Opinion, makes similar reference, 355 U. S. at page 110, footnote 7, ap parently overlooked by this Court.

II. The appellant stated as Specification of Error No. that the trial court completely omitted to instruct th jury in plain words when it should acquit. Appellant con tended that this constituted prejudicial error and pointe out that the trial court studiously avoided the words "no guilty" and "acquit". See pages 7-8, 13-16 of the openin brief of appellant Frank Palermo.

This Court did not discuss or dispose of this Specifica tion of Error, nor did it indicate in any way in its Opinio that it had considered the question.

III. The Court in its Opinion rejected the objection t the instructions of the district court, and the failure to in struct as to this appellant, on the use of hearsay evidenc of acts or declarations of co-conspirators as proof of mem bership in the conspiracy. It did so on the ground that th subject was a matter of admissibility. The Court concede that many cases have held such instruction restricting th use of such evidence to be proper and required. Thi Court's decision on this score is in conflict with the weigh of authority. Its decision is in conflict with *Lutwack v United States,* 344 U. S. 604, 618, 619, which clearly con templates instruction to the jury on the limitations appl cable to evidence of acts or declarations of co-conspirators So also *Glasser v. United States,* 315 U. S. 60. What thi Court has chosen to follow is *dicta* in *Dennis v. Unite States,* 183 F. 2d 201 (C. A. 2). But the Court of Appeal for the Second Circuit, notwithstanding the dicta in *Denni* holds specifically that the restrictive instruction is "re

quired by law''. *United States v. Soblen,* 301 F. 2d 236, 241 (C. A. 2, 1962). This Court proceeded on the theory that the admission of evidence of co-conspirators' acts or declarations is determined by the trial judge upon *prima facie* evidence of conspiracy—*ex* the evidence of such acts or declarations out of the presence of an alleged conspirator. But this being so, it unquestionably remains for the jury to determine whether it will find such evidence to be the fact: the jury must therefore be instructed on the use which it may make of such testimony to insure that hearsay evidence will not ''lift itself by its own bootstraps.''

As noted by this Court, the district court did instruct the jury on this score *but only as to the defendant Gibson,* and refused to apply the same charge or a requested charge to this appellant. This Court overlooked that the rendering of such charge as to Gibson made it obvious to the jury that the instruction not only did *not* apply to the other defendants, but that exactly the opposite applied to them. This added prejudicial confusion to prejudicial error.

IV. Appellant Frank Palermo adopts the reasons for rehearing stated by each of the other appellants in this cause.

Wherefore, this petition for rehearing should be granted.

Respectfully submitted,

JACOB KOSSMAN,
Attorney for Appellant
Frank Palermo.

Certificate of Counsel.

Counsel for Appellant Frank Palermo certifies that in his judgment this Petition for Rehearing is well founded and that it is not interposed for delay.

JACOB KOSSMAN

No. 17,762

IN THE

United States Court of Appeals

For the Ninth Circuit

'AUL JOHN CARBO, et al.,
Appellants,

vs.

'NITED STATES OF AMERICA,
Appellee.

PETITION OF APPELLANT GIBSON FOR A REHEARING

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No. 17,762

IN THE

United States Court of Appeals

For the Ninth Circuit

PAUL JOHN CARBO, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION OF APPELLANT GIBSON FOR A REHEARING

To the Honorable Stanley N. Barnes, Oliver D. Hamlin, Jr., and Charles M. Merrill, Circuit Judges, United States Court of Appeals for the Ninth Circuit:

Now comes the appellant, Truman Gibson, Jr., and respectfully urges the Court to provide a rehearing to reconsider his appeal from the judgment of the District Court of the Southern District of California entered on December 2, 1961.

In support of his petition for rehearing appellant Gibson shows to the Court the following:

I.

The section of the opinion of this Court entitled "The Factual Background" contains conclusions not warranted by the evidence in this case prejudicial to the appellant Gibson.

A. There is no evidence that the International Boxing Clubs (which are not parties to this proceeding) ever adopted any practice "of securing exclusive management agreements" through Carbo and Palermo or any other persons. There is certainly no evidence that Mr. Gibson was any party to any such arrangement. Mr. Gibson was not a party to *International Boxing Clubs v. United States,* 385 U.S. 242, so that conclusions there reached could not properly be deemed applicable to Gibson.

B. There is no evidence that Gibson "caused" payments to be made to Viola Masters. It is uncontradicted that these payments were directed by Mr. James D. Norris who was president of the International Boxing Clubs between 1954 and 1957.

C. The conclusions with respect to "the underworld" completely ignore, as does the remainder of the opinion, the numerous objections by the appellant Gibson to that line of questioning and the improper refusal of the trial court to require counsel for the government to define the term "underworld" though counsel for the government introduced the use of the term. Equally improperly, the district court forced the appellant Gibson to define the term which he did as meaning persons who had been convicted of serious crimes. This definition is apparently ignored by this Court in its opinion.

D. There is no evidence of "Leonard's vulnerability to economic pressure from Gibson."

E. The only evidence that "Gibson finally persuaded Leonard to call Palermo" was Leonard's own

estimony. Gibson denied this and the government's wn evidence as to Leonard's call from Los Angeles o Philadelphia contradicted Leonard's testimony in hat the call was made the day after Gibson left Los ngeles, not while he was there as Leonard testified, nd was not made from the Ambassador Hotel as eonard claimed, but was made from a drugstore a lock away.

F. There is no evidence even on the basis of the aly statements that Gibson was concerned about the elterweight title contrary to the conclusion contined in the Court's opinion.

G. There is no evidence that Leonard had received beating and had been hospitalized. Actually even the os Angeles Police Department publicly denied the uth of that assertion and Leonard did not dare to testify.

II.

The failure of the indictment to allege venue deprived the appellant Gibson of the means of a motion or change of venue. Thus the Court's conclusion that he failure of Gibson to move for a change of venue hrs his raising the question demonstrates the insufficiency of the indictment.

III.

The only knowledge of any threats ascribed to Gibson is what Leonard told him after the threats allegedly had been made. Ironically, Leonard and Nesseth agreed that Gibson directed them to the law enforce-

ment authorities when he was told of threats. Under these circumstances, and on the Court's own reasoning, there should have been a reversal as to Count V with respect to Gibson as there was as to Sica and Dragna. Equally, the admission of Leonard and Nesseth that Gibson originally assured them that their decisions need not be affected by threats of violence wholly belies his connection with the conspiracy charged in Count I.

IV.

The opinion implies that Gibson admitted the existence of business relations between himself and Carbo. In fact there was no such admission and there is no evidence of any such relationship between Gibson and Carbo.

V.

Gibson's suggestion of a Hart-Jordan fight as a means of solution of the financial difficulties of the Hollywood Boxing and Wrestling Club can not be regarded as "economic coercion." The Court's conclusion that these suggestions made Gibson a party to the conspiracy charged ignores the fact that the indictment did not so charge. There is no evidence of any connection of Daly with the Gibson proposal of a Hart-Jordan fight. Similarly, there is no evidence that Gibson authorized Daly to do any more than to try to assist Leonard in dealing with the problems of the Hollywood Boxing and Wrestling Club.

VI.

The Court's conclusions with respect to the "declarations of co-conspirators" are peculiarly prejudicial to Gibson. None of these statements was made in Gibson's presence. The district court refused to rule on the admissibility of such statements as to Gibson when they were offered and actually forbade objections based on this ground. The result of the views expressed by this Court is to deprive Gibson of elementary protections against hearsay and to deny to him a fair trial.

VII.

In considering "Sica's Underworld Reputation" the Court apparently gave no consideration to the obvious prejudicial effect of these allegations as to Sica's reputation in the indictment and the evidence in this regard on Gibson, a co-defendant. There was a similar disregard of the prejudicial effect of duplicate allegations and evidence as to Dragna.

VIII.

The cases cited by this Court in connection with the weight to be given to the uncontradicted evidence of Mr. Gibson's good character make it clear that it was not sufficient that the district judge only strongly suggested to the jury that it might find it improbable that a man of good reputation would commit a particular crime."

IX.

The reliance by this Court on the substantive counts in which Gibson was not charged as "overt acts at-

tributable to him on the two conspiracy counts" as justification for the denial of severance ignores the fact that the indictment did not charge those substantive acts as overt acts. Under these circumstances this Court's approval of denial of severance on that ground demonstrates that the denial of severance did in fact amount to the denial of a fair trial to Gibson because he was tried and convicted of offenses with which he was not charged.

X.

The Court apparently did not consider the prejudicial effect on Gibson of the instruction given by Judge Tolin to the jury with respect to the "agency" of Daly after the jury retired and when there was no opportunity for counsel to object to the instruction.

XI.

The combination of hearsay, statements of alleged co-conspirators, "underworld reputation," improper joinder, vague and confusing instructions, and limitation on the weight to be given the uncontradicted evidence of Gibson's good character combined to so effectively prejudice his defense as to deny him a trial in any real sense of the term.

XII.

In ruling on Gibson's attack on exclusion of Negroes from the jury this Court has ignored the fact that the district judge refused to permit the appellant to offer any proof to support the charge though it was tendered.

XIII.

The record does not support Judge Boldt's conclu-
ion that the oral testimony of Leonard and Nesseth
was duly and convincingly corroborated." In fact,
s to Gibson the Leonard-Nesseth testimony was not
nly not corroborated, it was actually in conflict with
her government evidence as well as uncontradicted
vidence for the defense. Under these circumstances,
ne narrow view expressed by this Court as to the
ole of the successor judge denies appellant any ju-
cial review of the sufficiency of the evidence after
erdict. The protection intended for defendants in
ne concepts of "reasonable doubt" thus has been
holly denied to this appellant.

XIV.

The length of the trial, the size of the record, and
ne limitations imposed by the Rules of this Court
n briefs and argument have so handicapped counsel
or the appellant in advising this Court with respect
t the wide variety of issues presented here that ef-
ective exercise of the appellate jurisdiction of this
ourt would be facilitated by a rehearing.

For all of the foregoing reasons appellant Gibson
espectfully requests the Court to rehear and recon-
sider his appeal.

Dated, March 12, 1963.

Respectfully submitted,

LOREN MILLER

WILLIAM R. MING, JR.

Attorneys for Appellant and Petitioner Gibson.

Certificate of Counsel

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, March 12, 1963.

William R. Ming, Jr.
Of Counsel for Appellant and Petitioner Gibson.

~~NO. 17662~~

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

N

O.

JOSEPH SICA,

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Appellant,

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vs.

6

UNITED STATES OF AMERICA,

6

Appellee.

2

PETITION FOR REHEARING BY JOSEPH SICA

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EDWARD I. GRITZ

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

- - -

JOSEPH SICA,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

- - -

PETITION FOR REHEARING BY JOSEPH SICA

- - -

TO THE HONORABLE JUDGES OF THE ABOVE ENTITLED COURT:

COMES NOW the Appellant, JOSEPH SICA, and respectfully petitions the above entitled Court for a rehearing as to him and urges:

THE CIRCUIT COURT HAS ERRED IN AFFIRMING THE CONVICTION AS TO SICA IN PART AND IN PARTICULAR IN OVERRULING OUR CONTENTION THAT SICA WAS PREJUDICED IN THE TRIAL COURT BY PERMITTING TESTIMONY AS TO THE REPUTATION OF SICA AS AN UNDERWORLD FIGURE AND AS A STRONG-ARM MAN.

With all due deference to this Court, the prejudice caused by this evidence far outweighed its probative value and the damage done was beyond any cure by way of instruction or explanation.

We cannot better state our position than as we urged

record (RT 707, 708):

"MR. PARSONS: To which the defendant Sica objects as incompetent, irrelevant and immaterial, and in effect this is an effort to introduce -- pardon me for not approaching the lectern sooner -- in effect this is an effort to bring before the court and jury evidence almost of other offenses or a propensity upon the part of Mr. Sica and the other defendants named, to resort to violence.

"We think it would be highly prejudicial and in the event any such testimony were offered or rather deduced here, we would have no alternative but to move this court for a mistrial. We do not believe it is material nor proper, and it is certainly highly prejudicial.

"I think we explored this on the motion to dismiss and on the indictment and that was gone into pretty fully.

"And the danger of such testimony, as was said in Benton v. United States, 233 Fed.(2), is that it creates an impression in the mind of the jury that is almost impossible to remove. I think your Honor once said, 'Once you press a button, the bell rings, that's it, you can't unring it,' or words to that effect, if I recall, if my memory serves me properly.

"We strenuously object to such testimony.

"MR. BRADLEY: If the court please, on behalf of the defendant Dragna we object to the Government introducing any evidence in regard to the reactions of the witness or the reasons why he had any such reactions, and previously cited to your Honor were the two latest Supreme Court cases in connection with this, the Michelson case in 1948 and Marshall v. United States in June of 1959 in which this very problem was discussed at length by the court. . . ."

This Court itself expressed a doubt concerning this evidence (Court's Opinion, p. 32).

Every time a motion to suppress is granted, the Government is deprived of some substantial evidence because justice requires it. Why make an exception in this situation?

There still remains to be answered the question of whether or not the other defendants knew of the alleged

reputation of underworld character of Dragna and Sica. If Sica stood in the position of a "dangerous weapon," was not Dragna then in the same position? We would not willingly harm Dragna - but where is the difference?

As counsel for Dragna so ably argued (Dragna's Opening Brief, p. 32):

> "We might add, however, an additional observation on this subject. The confusion and prejudice which resulted from the interjection by the Government of the reputation issue in the case is manifested by the instruction given by the court following objection by appellant to the fact that the court had not instructed the jury as to the limited purpose for which the reputation evidence had been admitted (RT 7705). Whereupon the court instructed (RT 7706):
>
> " 'THE COURT: The evidence of Leonard regarding the reputation of certain defendants was admitted into evidence and shall be considered by you only as showing or as evidence upon the subject of what Leonard's state of mind was concerning those defendants.
>
> " 'There has been no independent testimony regarding the reputations of those defendants. Reputation, as you know, is what the community thinks a person is. What the character of those defendants might be you may assess from all of the evidence in the case which might bear upon that subject. (Emphasis added.)'
>
> "Not even the prosecution, and certainly not the defendants, had put the character of the defendants in issue. But the court, by its instruction, turned the jury loose on this irrelevant and, what could only be, prejudicial tangent. (See Bloch v. United States, 221 F.2d 786, 790 (CA 9, 1955) and United States v. Tomaiolo, 249 F.2d 683, 689 (CA 2, 1957).)"

We again respectfully urge the Court has misconstrued the meaning of Michelson v. United States, 335 U. S. 469, 475, 69 S.Ct. 213, 218, and Benton v. United States, 233 Fed. 2d 491. The cases cited by the learned Court were dediced before Michelson and thus, by implication, were overruled.

In assessing this testimony, this Court has apparently given no consideration to the fact Leonard testified

before the California Athletic Commission as follows:

"Joe Sica and the other fellow, Mr. Dragna, as far as threatening, they weren't threatening." (RT 1232). On the morning of the 4th of May (Legion Meeting) "Sica never threatened" (RT 1233). "Joe didn't have too much to say" (RT 1235). That he asked Joe Sica in getting his help to arrange a fight for Leonard; that he went to see Sica and Sica went East and met him in New York; that they often met (RT 1239, 1240). Nesseth stated he had never had a misunderstanding with Sica; Sica never threatened him or frightened him (RT 1921).

THE ANONYMOUS PHONE CALL TO CHARGIN.

Nowhere in the record is there testimony which justifies the inference that Sica or anyone in his behalf phoned Chargin. Almost a month intervened between Sica inquiring of Dros when Chargin was coming to town. Sica never once attempted to influence Chargin. Remember, Chargin and Livingston were trying to get Sica to arrange a championship fight for their fighter.

Livingston, manager of Gonsalves, in the presence of Chargin, said they met Sica at Chargin's office; they asked Sica to help get their fighter Gonsalves a chance at the championship; it was friendly; Sica was doing them a favor (RT 2329-1231). Even Chargin said this in effect (RT 2245-2247); Sica never threatened him (RT 2253, 2256, 2257).

CONCLUSION

We respectfully ask the Court that this case of first impression in some respects and the importance of the rulings calls for a rehearing.

We further urge that the rehearing should be granted and the matter heard by the Court En Banc.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Defendant-Appellant, Joseph Sica

EDWARD I. GRITZ,

IENER W. NIELSEN,

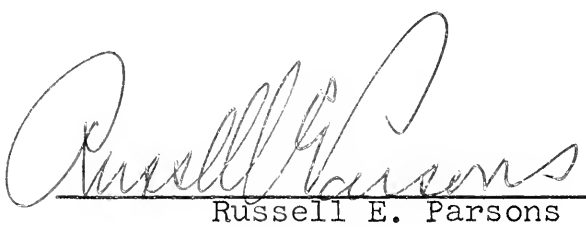
Of Counsel.

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA)
) ss
County of Los Angeles)

I, RUSSELL E. PARSONS, attorney for the Appellant JOSEPH SICA, do hereby certify that in my opinion the Petition for Rehearing is well founded and that it is not interposed for delay.

DATED at Los Angeles, California, this 6th day of March, 1963.



Russell E. Parsons

No. 17967

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

PACIFIC SUPPLY COOPERATIVE, an Oregon Co-operative Corporation, Appellant,

v.

FARMERS UNION CENTRAL EXCHANGE, INCORPORATED, a Minnesota Corporation,

and

NATIONAL COOPERATIVES, INC., a District of Columbia Corporation, Appellees.

Appeal from the United States District Court
for the Eastern District of Washington,
Southern Division

PETITION FOR REHEARING

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No. 17967

UNITED STATES COURT of APPEALS
FOR THE NINTH CIRCUIT

PACIFIC SUPPLY COOPERATIVE, an Oregon Co-operative Corporation, Appellant,

v.

FARMERS UNION CENTRAL EXCHANGE, INCORPORATED, a Minnesota Corporation,

and

NATIONAL COOPERATIVES, INC., a District of Columbia Corporation, Appellees.

PETITION FOR REHEARING

Appellant[1], pursuant to Rule 23 (28 U.S.C.A., 1962 Supp., p. 92), respectfully seeks a rehearing and correction of this Honorable Court's Opinion filed herein June 3, 1963, on the following grounds:

1. Summary disposition of the trademark issues was premature under the Rules, including Rules 6, 15, 16, 41 and 56 F.R.C.P., and so-called Handbook Procedure (25 F.R.D. 351-475), and appellant was not afforded proper notice or due process under U. S. Constitution Amendment V when the District Court terminated pretrial proceedings and summarily granted dismissal of claims before appellant had completed discovery in face of the order staying discovery (R. 570-572), and before any pretrial order had been formulated, completed or approved by counsel and the court

[1] As in the Briefs, appellant will be referred to herein as Pacific, and appellees as FUCE and National.

(R. 1451-1460), and before appellant had presented all of its proofs on the issue of exclusiveness.

2. The Opinion (pp. 3-12) errs when it accepts the incomplete Pretrial Order (R. 1451-1460) as "controlling." The stipulations are admittedly out of context (R. 9210-9214, 9325) and should be read with all the other evidence produced and to be produced at trial. Any pretrial order or stipulation can be changed at any time prior to completion of trial on the merits to promote justice and under the principle that a pretrial order is not an order until it is completed.

3. The Opinion also errs when it equates equal membership rights with contract rights, equitable rights of a proprietary nature, or rights growing out of exclusive use or estoppel — all questions of fact which should be resolved at trial (R. 339, 1707, 9140-9142, 9210-9214, 9239-9240, 9325).

4. **White Motor Co. v. U. S.,** 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. (2d) 738, decided after argument of the case at bar, construes Rule 56, F.R.C.P., as requiring a trial on the merits in cases wherein the facts and inferences reasonably to be drawn create real doubt. The record here creates real doubt as to the existence or nonexistence of exclusive trademark rights claimed by Pacific within its trade area, either owned by or granted to Pacific under express or implied agreements with National, or through long-time acquiescence of the parties creative of an estoppel precluding National and FUCE from infringing upon those claimed trademark rights in the trade area. Proofs show Pacific's user was substantially exclusive (15 U.S.C.A.

1052(f) as to each of the symbols, collective and ordinary, on various classes of goods, some sponsored by National and some by Pacific alone (R. 52-56, 283, 284-285, 287, 288, 292, 306-308, 350, 351, 352, 383, 384, 409-410, 750, 751, 752, 755, 756, 760-761, 765, 767, 768, 769, 771, 772, 997-1000, 1048, 1073, 1086, 1087, 1088, 1116, 1119-1120, 1126, 1163, 1164, 1706, 1707, 1708, 9140-9142, 9240, 9640-9641).

5. Fact questions remain for determination at trial "to determine the understanding of the parties" (p. 8, Opinion) as to amendments to the By-Laws and as to all of the conduct and practices of the parties before and after the effective date of the Lanham Act, July 5, 1947 (15 U.S.C.A. 1051, et seq.), including interpretation and construction of the By-Laws, the Caldwell Agreement (R. 296), Pacific's Membership Agreement, the nature of National and its relationship to the Regionals as beneficial owners of the marks or as exclusive licensees of National as registered owner of the marks "for the benefit of its members," to resolve the ambiguous documents and circumstances and to determine credibility of witnesses. (Cf. **Frito-Lay, Inc. v. Morton Foods, Inc.** (C.A. 10), 316 F. (2d) 298.)

6. A fact issue exists as to whether National and/or FUCE owe fiduciary obligations to Pacific due to the relationship of said parties, as in **Taussig v. Wellington Fund, Inc.,** 187 F. Supp. 179, 211-216, cert. den. 31 L.W. 3407 (6/10/63), particularly when it was admitted at pretrial that National cannot compete with Pacific under either ordinary or collective marks and FUCE cannot misappropriate Pacific's good will by

misuse of the marks through lack of control by National (R. 9077).

7. The Opinion misinterprets the Lanham Act (15 U.S.C.A. 1051 et seq.), particularly Sections 1052(f), 1065, 1115, 1127, and Section 49 of the Act (Note following 15 U.S.C.A. 1051). The Court erred in holding that the Lanham Act operated retroactively to destroy the vested trademark rights claimed by Pacific, when such an interpretation of the Act would violate the U. S. Constitution, Amendment V (Constitution U.S.C.A. p. 297) related to due process. A fact question is also presented under Section 49 which expressly preserves existing trademark rights generated by Pacific's user of the marks on goods within its claimed exclusive trade area prior to the effective date of the Act.

8. The Court erred in holding that the amended By-Laws granted only non-exclusive rights, and that the amendments to the By-Laws operated retroactively to destroy both contract and vested property rights in terms of good will generated through trademark uses by Pacific within its claimed exclusive trade area.

9. The Opinion erred in concluding that Pacific, by mere assertion of its claims to exclusive trademark rights within its trade area, was contesting the validity of the trademarks and the trademark registrations held by National "for the benefit of its members," prior to determination of the fact issue defining Pacific's trademark rights as those of a beneficial equitable owner (R. 1073, 1086, 1087, 1707, 1708, 7979) or as those of an exclusive licensee (R. 52-55).

10. Dismissal of the case as to National on the basis of insufficiency of the third party complaint was unjustified in the light of principles of **Foman v. Davis,** 371 U.S. 178, 83 S. Ct. 277, 9 L. Ed. (2d) 222.

11. The Opinion erred by finding Pacific is estopped by membership in National and by permitting National to register the marks, contrary to **Huber Baking Co. v. Stroehmann Bros. Baking Co.,** (C.A. 2), 252 F. (2d) 945, cert. den. 358 U.S. 829, 3 L. Ed. (2d) 69, and by failing to allow a trial on the question of estoppel in favor of or against Pacific growing out of conduct of the parties (R. 409-410).

12. The Opinion fails to adopt and follow the Washington law which holds an implied in fact contract based upon manifestations of the parties becomes a fact question, as recently determined by this Court in **Osborne v. Boeing Aeroplane Company** (C.A. 9), 309 F. (2d) 99 (1962).

A rehearing should be granted en banc or before the panel which rendered the Opinion herein[2].

Respectfully submitted,
CAMERON SHERWOOD
of SHERWOOD, TUGMAN AND GREEN
ROBERT A. COMFORT
of COMFORT, DOLACK AND HANSLER
Attorneys for Appellant

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(2) All counsel for appellant desire that this Record shall reflect their sincere belief that the language on pages 2 and 3 of the Opinion, criticizing the presentation of appellant in its Briefs, should be moderated for the reason that counsel had no intention of violating any Rule of this Court nor any Canon. Counsel humbly express regret that any deficiencies appear in the Briefs.

CERTIFICATE OF COUNSEL

We hereby certify that in our judgment as counsel for appellant this Petition for Rehearing is well founded and that it is not interposed for delay.

Cameron Sherwood
Robert A. Comfort

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 17771

DRESSER INDUSTRIES, INC., a Corporation,
Appellant,

vs.

SMITH-BLAIR, INC., a Corporation,
Appellee.

PETITION FOR REHEARING

EDWARD B. GREGG,
Attorney for Petitioner.

Of Counsel:

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 17771

DRESSER INDUSTRIES, INC., a Corporation,
Appellant,

vs.

SMITH-BLAIR, INC., a Corporation,
Appellee.

PETITION FOR REHEARING

Appellant respectfully petitions for rehearing on the ground that the decision of this Honorable Court is contrary to law and in violation of the Constitution of the United States.

1. The decision incorrectly applies the standard of invention of the A & P Case (*Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147) and states "the A & P Case . . . continues to be the law." Contrary to the Patent Act of 1952 and Art. 1 Sec. 8 of the Constitution. Congress has plenary powers to legislate in the subject of patents and there can be no limitation of its right to modify the patent law. (*McClurg* v. *Kingsland*, 42 U. S. 202, 11 L. Ed. 102.) In enacting the Patent Act of 1952, Congress defined the requirements of patentability and stated expressly that a "person shall be entitled to a patent" if these requirements are met (35 USC 101-103). This Court does not have the power to set or apply standards of patentability different from those enacted by Congress.

2. The Court reached a conclusion that the invention is obvious by a side-by-side and part-by-part comparison of components and ignored compelling objective evidence that the subject matter as a whole was not obvious at the time the invention was made to a person having ordinary

skill in the art to which the subject matter pertains as prescribed by 35 USC 103, contrary to its decision in *Stearns* v. *Tinker & Rasor,* 220 F. 2d 49 and contrary to decisions in other circuits: *Reiner* v. *I. Leon Co., Inc.,* 285 F. 2d 501 (CA 2), *Honolulu Oil Corp.* v. *Shelby Poultry Co.,* 293 F. 2d 127 (CA 4), *National Latex Products Co.* v. *Sun Rubber Co.,* 274 F. 2d 224 (CA 6), *Mott Corp.* v. *Sunflower Industries, Inc.,* 137 USPQ 288, —— F. 2d —— (CA 10).

3. The holding that the Lindsay British patent is analogous art on the basis of an element-by-element comparison is contrary to the law as stated by this Court in *Stearns* v. *Tinker & Rasor,* 220 F. 2d 49 that even if a similarity of elements is assumed, an art is not analogous if there is no similarity of purpose of the device as a whole. As the present case cannot be distinguished from Stearns, the decision amounts to a *sub silentio* repudiation and overruling of Stearns and is contrary to the law established in other circuits, e.g. *Mott Corp.* v. *Sunflower Industries, Inc.,* 137 USPQ 288, —— F. 2d —— (CA 10).

4. The decision denying appellant's request for remand for consideration of the Patent Office files of two of appellee's patent applications, access to which had been denied to appellant by the District Court, is contrary to the law enunciated in *James B. Clow & Sons, Inc.* v. *U. S. Pipe & Foundry Co.,* 313 F. 2d 46 (CA 5). An examination of these files, which have now become public through issuance of the patents, and an examination of a part of the file of a corresponding Canadian patent application which would have been uncovered had the District Court granted appellant's motion during discovery proceedings, discloses that they relate to the fundamental issues of analogy of prior art and the presumption of validity as well as the issue of who was the first inventor—the identical issue involved in the *Clow* case.

5. The decision holds that the Lindsay patent rebuts any presumption of validity attaching to the grant of the

oke patent contrary to the decision of this Court in *tearns* v. *Tinker & Rasor* (*supra*) that the presumption f validity is not rebutted by a patent showing only a mponent in a different environment. The presumption f validity is based on the expertise of the Patent Office. the Trial Court had granted appellee's motion to in- pect the files of appellee's patent applications, the inspec- on would have revealed that the Patent Office did not te Lindsay against appellee's patent application on the cused pipe clamp, now patent No. 3,089,212 and did not clude Lindsay in the list of prior art on the patent even ough the applicant called Lindsay to the attention of e Patent Office. Appellee has now been granted two atents (2,998,629 and 3,089,212) on sliding finger pipe pair clamps, indicating that the Patent Office does not nsider Lindsay pertinent to pipe repair clamps.

6. The decision construes the term "clamp" to mean clamping component" and then proceeds to compare the clamping component" with the "clamp" of the Lindsay ritish patent, contrary to *Oregon Saw Chain Corp.* v. *IcCulloch Motors Corp.* —— F. 2d —— (CA 9, Decided ctober 9, 1963) holding that the claim of a patent is to e interpreted in the light of its specification. The speci- cation as well as the custom in the trade makes it clear hat the "clamp" is the entire device including flexible and, gasket, lugs and bolts. When properly interpreted here is no similarity of structure or purpose between the exible band type pipe repair clamps of the Hoke patent nd the hook bolt adapters of Lindsay. In this connection he Court said (page 7):

> "If the word 'clamp' means the whole patent device, then a comparison of the Hoke patent, with the Lindsay patent, will indicate a clear difference."

7. The decision holds that eleven findings challenged y appellant are not clearly erroneous because they are mbiguous, contrary to the decision of this court in *Velsch Co. of Calif.* v. *Strolee of Calif., Inc.,* 290 F. 2d

509 and *National Lead Co.* v. *Western Lead Products Co.* 291 F. 2d 447 that the findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision and enable it to determine the ground on which the trial court reached its decision. Explicit and unambiguous findings are of particular importance when the trial court writes no decision. Where findings are prepared by counsel and not even edited by the court, this decision puts a premium on ambiguity rather than explicitness. Furthermore, this court failed to exercise its jurisdiction within the scope of review provided by *Costello* v. *Fazio,* 256 F. 2d 903 (CA 9) and other cases in this and other circuits which state that the "clearly erroneous" rule is not applicable to "findings" which are merely conclusions.

8. Finally, reconsideration is requested of the decision by the Court that the entire patent is invalid. On page 18 the Court states:

> "The term 'clamping component' is used because only Hoke claims 1 to 8 are in issue. The component that secured the ends of the band to the lugs is described in claims 8 through 12."

Although appellee has contended that the "clamping component" is anticipated by Lindsay, even appellee admits that there *was* a problem in using sliding fingers *in combination* with satisfactory means for securing the ends of the band to the lugs. (Finding 19.) While a court can hold invalid claims not charged to be infringed, appellate courts wisely refrain from ruling on issues which have not been tried below. *Yavitch* v. *Seewack* (CA 9), 13 USPQ 102, —— F. 2d ——. It is well established that some claims of a patent may be valid even though others are held invalid. *Pursche* v. *Atlas Scraper,* 300 F. 2d 467 (CA 9).

Request for Rehearing *En Banc*

Pursuant to Rule 23(5) of the Rules of this Court, appellant respectfully requests the rehearing of this appeal

n banc. Western P.R. Corp. v. *Western P.R. Co.,* 345 J. S. 247 (1952).

The Constitution vests in Congress the *sole* power to stablish the legal criteria of patentability. Congress as established such criteria in the Patent Act of 1952 which supersedes those of the earlier *A & P* case and herefore, the application of those judicial criteria is an nconstitutional usurpation of the power of Congress. The standard of patentability is a constitutional stand-rd." *Pressteel Co.* v. *Halo Lighting Products, Inc.* CA 9), 137 USPQ 25, —— F. 2d ——. (Decided March 6, 963.)

It is submitted that the constitutional implications of he decision and the issues of law presented are of suffi-ient importance to warrant a rehearing *en banc.*

Respectfully submitted,

EDWARD B. GREGG

Edward B. Gregg,
Attorney for Petitioner.

Of Counsel:

ROBERT E. BURNS,
150 Nassau Street,
New York 38, New York.

Dated this 12th day of November 1963.

Certificate

The undersigned, Edward B. Gregg certifies that in his udgment the foregoing Petition for Rehearing is well ounded and in full compliance with the Rules of this Court and that it is not imposed for delay.

EDWARD B. GREGG

Edward B. Gregg,
Attorney for Petitioner.

See also Vol. 3186

No. 17816

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CIFIC COAST CHEESE, INC., and EVERT L. HAGAN, Appellants

=v=

. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, Appellee

++++

ppeal from the United States District Court for the Southern District of California

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APPELLANTS PETITION FOR RE-HEARING

====

JESSE A. HAMILTON,

115 North Eastern Avenue,
Los Angeles 22, California.

Attorney for Appellants.

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CIFIC COAST CHEESE, INC., d EVERT L. HAGAN Appellants =v= WILLARD WIRTZ, Secretary Labor, U. S. Department of bor. Appellee	No. 17816 PETITION FOR RE-HEARING

TO: THE HONORABLE JUSTICES OF THE NINTH CIRCUIT COURT OF APPEALS.

COMES NOW PACIFIC COAST CHEESE, INC., and EVERT L. HAGAN, and spectfully petition the above Court for a re-hearing in the above tter.

Said petition is made upon the following grounds:

1. After the remand upon the first appeal, the trial court s of no disposition to allow the production of evidence and actically forced the stipulation concering the review of the case, on appellants.

2. The trial court did not, in fact base his second judgment on the basis of burden of proof, but rather based it upon dislike appellants or their previous counsel.

3. The trial court did not follow the Mandate of this Court on the first appeal. In this connection, and regardless of the al court's concept of the burden of proof, the trial court nored the matter of the five cents per hour. There was evidence

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

n the record, from which these matters could be computed. On
age 242 , of transcript there appears the following, (lines 14,
rough 19):

" MR. McMULLEN: There is one thing, if I may bring it
p, sir, that has not been properly done before this court,
nd that is the ammount of five cents an hour. I believe
hat could be easily computed.

" THE COURT: Let's wait until I decide whether or
ot that is going to be an issue in this case."

The trial court having arrived at the conclusion at the end
f the trial that he disbelieved the plaintiffs' witnesses and
elieved the defendants' witnesses, then proceeded to ignore
ne five cents per hour arrangement upon his review of the case
llowing the remand on the first appeal.

Respectfully submitted:

JESSE A. HAMILTON,
Attorney for Appellants.

ated: March 1963

CERTIFICATION

I certify that in my judgment the foregoing petition is well
unded and that it is not interposed for delay. I further certify
at, in connection with the preparation of this petition, I have
amined Rules 18 and 19, for United States Circuit Court of
peals, for the Ninth Circuit, and that, in my opinion, the
regoing petition is in full compliance with these rules.

JESSE A. HAMILTON,
Attorney for Appellants.

ted: March 19, 1963.

No. 17818

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELI LUBIN and GLENN M. THARP, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

FRANCIS C. WHELAN,
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THOMAS R. SHERIDAN,
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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELI LUBIN and GLENN M. THARP, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Pursuant to Rule 23 of this Court, appellee herein respectfully petitions this Court for rehearing in the above-captioned cause.

Oral argument in this matter was heard on October 4, 1962, before Chief Circuit Judge Richard H. Chambers and Circuit Judges Frederick G. Hamley and Ben C. Duniway. The opinion and decision of this Court was filed on the 11th day of February, 1963, and this petition is filed herewith within the time provided therefor by provision of Rule 23 of this Court.

Attached hereto is a Certificate of Counsel for the Appellee pursuant to Rule 23 of this court that in his judgment the petition is well founded and is not interposed for delay.

Grounds for Granting a Rehearing in This Matter.

The decision of this Court reversed the judgment of the District Court on the grounds that the evidence did not sustain the conviction of appellants. The decision of the court made no further elaboration as to what action should be taken. Accordingly, the petition of appellee for rehearing is to determine (1) whether the appellants may be retried in the District Court on all issues in the case or (2) whether the case may be remanded to the District Court on the sole issue as to whether or not the money being transported by the Armored Transport of Los Angeles to the Los Angeles County General Hospital was "property or money . . . belonging to" a federally protected bank within the meaning of 18 U. S. C. Sec. 2113(b) and (f).

When a Judgment is reversed because the evidence is not sufficient to sustain a conviction and the appellant had made all proper and timely motions for acquittal in the United States District Court the Circuit Court of Appeals may direct a new trial.

Bryan v. United States, 338 U. S. 552 (1950).

The Court, in the next to the last paragraph of the decision, states ". . . that the proof would sustain conviction under the California law." In the ordinary situation it would be more expedient and practical to present this case to the proper authorities in the State Court for prosecution. However, in this case the record indicates the conspiracy terminated on approximately June 4, 1959, the date of the loss of a bag of currency containing $113,200. As this Court has pointed out the conspiracy to take money and property from the possession of Armored Transport of Los Angeles

would be an offense under the laws of California. (California Penal Code, Sec. 182, dealing with conspiracy, and 484 dealing with theft.) However, the applicable statute of limitations in the State of California for this offense is three years. (California Penal Code, Sec. 800.) Therefore, if the appellants are to be prosecuted on this evidence, it must needs be in the United States District Court for the Southern District of California.

Appellee accepts without qualification the considered opinion of this Court that an ambiguous stipulation should be interpreted in the favor of appellants. To appellee's knowledge this is a case of first impression. Appellee's complaint is that it relied in good faith on *its interpretation* of the stipulation which was not challenged throughout the trial by the appellants. Accordingly, appellee has not had its day in court to present evidence on the factual question of where legal title rested when the money was in the Armored Transport truck. This Court has quoted appellant Tharp's testimony on this issue. In order for the trial judge to convict appellant Tharp it was necessary to conclude that Tharp committed perjury in the course of his testimony. Accordingly, on this appeal this Court ought not to rely on any portion of the testimony of one who lied under oath. Furthermore, over government objection, Tharp was testifying to legal conclusions and to the contents of written documents although there was no showing that the documents were not in existence or reachable by a *subpoena duces tecum.*

Appellee desires to present on a rehearing an argument that the Court follow a procedure outlined in *Donato v. United States,* 302 F. 2d 468 at 470 (9th

Cir. 1962); and *Ogden v. United States,* 303 F. 2d 724 (9th Cir. 1962), (non-production of Jencks Act statement). Appellee believes that the issue of fact here may be resolved by remanding to the District Court the precise question as to whether or not the property being transported from a federally protected bank in downtown Los Angeles to the Los Angeles County General Hospital belonged to the bank at the time of transportation.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

TIMOTHY M. THORNTON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

Certificate of Counsel.

Timothy M. Thornton, being Assistant United States Attorney and a member of the Bar of this Court and attorney of record for appellee herein, herewith certifies that this Petition For Rehearing is in his judgment well founded and is not interposed for delay.

Dated: March 11, 1963.

TIMOTHY M. THORNTON

No. 17821

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW ZEALAND INSURANCE COMPANY, LIMITED,
Appellant,

vs.

LOUIS LENOFF and ELLA LENOFF,
Appellees.

APPELLEES' BRIEF.

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ROBERT A. KLEIN and
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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW ZEALAND INSURANCE COMPANY, LIMITED,

Appellant,

vs.

LOUIS LENOFF and ELLA LENOFF,

Appellees.

APPELLEES' BRIEF.

Statement of Jurisdiction.

This appeal is from a final judgment, entered January 25, 1962, in the United States District Court for the Southern District of California, Central Division. Jurisdiction of the District Court arose because of diversity of citizenship of the parties and an amount in controversy in excess of $3,000. Jurisdiction of the Court of Appeals exists by reason of 28 U. S. C. 1291.

Introduction.

This action was commenced by Louis and Ella Lenoff upon one or both of two successive policies of insurance issued by Defendant and Appellant, New Zealand Insurance Company, Limited (herein referred to as "New Zealand") to recover the cost of repairing real property damaged by earth movement. Because of find-

ings of the Trial Judge that the damages were suffered during the term of the policy later in time [Ex. 2], only that policy is considered on this appeal.

Exhibit 2 is a California Homeowners form "C", issued by New Zealand for the term commencing November 5, 1955, and ending November 5, 1958. In this form of policy, coverage is afforded for physical loss to the insured property caused by any peril or perils not specifically *excluded* from the policy by its terms.

The present appeal involves principally Appellant's contention that damages to Plaintiff's home were caused by an excluded peril, *i.e.*, "settling" as that word is used in exclusion (g) of the policy. Another contention is that the loss suffered was not a fortuitous event, as is required for insurance coverage. Other contentions pertain to the amounts of damages recoverable and bases for computation of interest.

Statement of the Case.

Plaintiffs' property consists of a one-story, single family dwelling, situated at 3437 Longridge Avenue, in Sherman Oaks, California. It contains some 2250 square feet of living space, with attached garage, and is constructed on a concrete slab foundation. [2 Tr. 9:17-21; 12:24-13:2.][1]

At this location, Longridge Avenue runs generally north and south, sloping upward to the south. [2 Tr. 7:6-10.] The Lenoff dwelling is situated on a lot on the west side of Longridge, the south edge of which is approximately level with Longridge, but with the north

[1] "1 Tr." refers to Volume I of the Transcript; "2 Tr." refers to Volume II. The number preceding the colon refers to the page, and the number following, to the line.

edge about six feet above grade. [2 Tr. 8:3-8.] A building pad extends westward from the street about 100 feet, at which point the lot rises in a hill or bank. [2 Tr. 7:16-23; 13:3-10; 7:24-8:2.]

Prior to development, the natural terrain at this location was a steep canyon. [2 Tr. 198:14-16.] Building sites were created by filling in the bottom of the canyon and cutting into the canyon side. [2 Tr. 198: 16-21.] Thus, the part of the Lenoff's lot where the dwelling was situated consisted of compacted fill, over uncompacted fill, resting on natural soil. [1 Tr. 32: 9-11; Ex. "A".]

In 1952, Julius Solomon, a building contractor, purchased the lot from the developer and constructed the Lenoff home. [2 Tr. 6:8-22.] The Lenoff's bought the property in 1953, and moved in shortly before Christmas of that year. [2 Tr. 73:8-22.] At the time of purchase, the building was carefully inspected and found to be in good condition, with no indication of any defect. [2 Tr. 47:8-48:9; 73:13-15.]

About Thanksgiving, 1955, the Lenoffs' home suddenly began to sink and disintegrate. Without a trace of prior damage to the property, the house abruptly developed numerous and extensive cracks in the walls and floors, as much as one-half inch wide; the east side of the house and attached garage dropped some 12 inches; the floors tilted to a marked degree, the doors and windows could not be opened or closed properly, and openings and separations as much as two inches appeared in the pavement, driveway, and patio areas around the house. [2 Tr. 15:14-17:22; 42:19-25; 58:4-60:3; Exs. 5, 6.]

About two years later, the east side of the house dropped an additional six inches, tilting of the floors increased, the number and width of cracks in the walls and floors increased, and wider cracks occurred in the pavement and patio areas around the house. [2 Tr. 18:10-15; 61:19-62:4.] Appellant does not dispute on this appeal the finding of the Trial Judge that these later manifestations of damage were but an enlargement of a loss which would continue until repair. [1 Tr. 33:12-27.]

To effect repairs to the structure, the Lenoff's engaged Solomon, the original builder, who recommended employment of an engineer, soil expert or both. [2 Tr. 41:3-8.] The Lenoff's consulted a geologist and a mechanical and civil engineer specializing in foundation and subsidence problems. [2 Tr. 130:9-131:7; 168:25-169:1.]

The geologist examined aerial photographs of the area taken before the grading and development was done and made a physical examination, including the boring of test holes in the soil. [2 Tr. 198:10-13.] According to his findings, the filling of the canyon in the development of building sites, and the addition of compacted fill, had created a barrier to the natural flow of water, which otherwise would have escaped down the canyon. [2 Tr. 198:18-21.] Underground waters resulting from percolation of water from irrigation of lawns and rainfall, would be impounded behind the compacted fill and would gradually build up. [2 Tr. 198:18-24.] Such impounded subsurface waters coming into contact with loose and uncompacted fill, such as under the Lenoff's property, would create an unstable condition of the soil which would facilitate and accelerate subsidence. [2 Tr. 198:24-199:5.]

Stability of the house could not be restored without conducting extensive repairs to the foundation and stabilization of the soil beneath the house. Without such stabilization and foundation repair, further damage would certainly result to the building and there was a "very good possibility" of collapse. [2 Tr. 143:10-144:9; Ex. "A".] The only feasible method of accomplishing such repair, was by constructing an underpinning of beams and caissons sunk to bedrock. [2 Tr. 136:7-11.]

When holes for caissons were bored, the earth for a depth of some 18 to 20 feet below the surface was found to be normal soil. [2 Tr. 20:11.] Below that level, for an additional 10 to 12 feet, the earth proved to be very "mucky, . . . the soil was so wet that it just got very muddy and poured off of the shovel—poured out of the shovel." [2 Tr. 20:13-15.] Below that level, they encountered "a regular stream" of water, which was pumped out before reaching the bedrock, some 30 to 32 feet below the surface. [2 Tr. 20:16-21:3.]

Costs of repair, including stabilization of the foundation, were itemized in Plaintiffs' Exhibit 4, and total $20,938.47. [2 Tr. 28:6-21; 35:9-23.] It was stipulated that the sums expended were reasonable for the work done. [2 Tr. 35:9-12.]

On June 28, 1956, after initial appearance of damage, but before repairs were accomplished, Plaintiffs filed proof of loss in the amount of $15,000. Five days after receiving Plaintiffs' proof of loss, New Zealand attempted to cancel the homeowners' policy, which attempt, the Trial Judge found to be ineffectual. New Zealand thereupon requested an appraisal

pursuant to the policy terms. The appraisers made an award in the amount of $8,684.50, such amount including only the cost of repairing the dwelling and extra living expenses. [Ex. I.] It was stipulated during the trial that the award did not include any portion of the cost of underpinning and stabilizing the foundation. [2 Tr. 216:21-219:9.]

New Zealand thereupon denied coverage for any portion of the loss, including the amount of the appraisal. The Lenoff's, thereafter, proceeded to effect repairs in accordance with such right under the policy. This litigation ensued.

Statement of Issues.

I.

Was the Trial Judge in error in concluding that physical loss to Plaintiffs' dwelling was not proximately caused by an excluded peril?

II.

Was the *occurrence* of a loss, as distinguished from possibility, a fortuitous event?

III.

Were the costs of stabilizing the soil beneath the dwelling properly an item of repair?

IV.

Are Appellees precluded by the appraisers' award from recovery of their full measure of damages?

V.

Was Appellant's attempted cancellation effective to terminate its obligation to repair damage from a continuing loss?

VI.

When did damages become ascertainable?

Summary of Argument.

I.

An excluded peril excepts coverage under an all risk policy only when it proximately causes the loss. The proximate cause of the loss herein, accumulation of underground water, was not an excluded peril.

II.

The claim of inevitability as precluding a fortuitous event for insurance coverage purposes has been rejected by California courts.

III.

The repair and stabilization of the foundation and subsoil were an integral and essential part of the repair of the dwelling.

IV.

The appraisal award does not preclude Appellees from recovering their full measure of damages, since it failed to include all items of repair, was grossly inadequate, and, in any event, Appellant is estopped to rely upon it because of its own breach of contract.

V.

Defendant could not relieve itself, unilaterally, of its obligation to compensate for repairs of damages during a continuing loss.

VI.

Damages were ascertainable prior to filing of suit, and were fully established when repairs were accomplished.

I.

The Activating or Proximate Cause of Plaintiffs' Loss Was Not "Settling" as That Term Is Used in Exclusion (g) but the Accumulation of Underground Water, a Non-Excluded Peril.

Defendant insurer relies upon Exclusion (g) of the Policy which specifies that the policy does not insure against "loss by . . . settling . . .". Defendant urges that the earth movement beneath Plaintiffs' dwelling was a downward displacement of the soil, that such movement may be described as a "subsidence", that subsidence is equivalent to "settling", and hence, as a matter of law, the trial judge should have concluded that Plaintiffs' loss was occasioned by "settling" and hence excluded.

Sabella v. Wisler (1963), 59 A. C. 29, a recent decision of the California Supreme Court, has now clarified the law pertaining to exclusions identical with the one relied upon by defendant herein. In *Sabella v. Wisler,* the insured's home had been constructed upon a building site made up of fill material which had not been properly compacted. Approximately three and a half years after the dwelling was constructed, the dwelling subsided at various locations in distances ranging from 2″ to 7″. The trial court found that between November of 1958 and February 1, 1959, some three to six months prior to the first manifestation of appreciable damage, a sewer pipe from the house had begun to leak, allowing water to infiltrate the unstable earth beneath the dwelling, causing the house to sink.

As in the present case, the insurer's policy covering the dwelling, contained an exclusion for settling. The District Court of Appeal had interpreted the exclusion

to be limited to "normal settling", and had reversed the judgment in favor of the insurer, denying recovery for the amount of damage sustained. The Supreme Court, however, ruled that the term "settling" connoted the tendency of uncompacted earth to settle of its own weight and with the weight of a structure which the earth might support, and that the term as used in the Policy contained no limitation as to the amount of compaction or the rapidity with which the compaction might occur.

Nevertheless, the Supreme Court reversed the judgment in favor of the insurer upon the basis of findings of the trial court that the earth movement had been triggered by the interjection of sub-surface waters leaking from the defective sewer pipe. The Supreme Court pointed out that under Sections 530 and 532 of the California Insurance Code, an excluded peril is not excepted unless it is the proximate cause of the loss. The fact that an excluded peril may have joined with a non-excluded peril in contributing to the loss or may have been the immediate cause of the loss, does not eliminate coverage if a non-excluded peril is the "proximate cause" in the sense of setting in motion the events which resulted in damage.

In reaching this conclusion, the Supreme Court disapproved any contrary implications appearing in a prior opinion of the District Court of Appeal in *Hughes v. Potomac Insurance Company* (1962), 199 Cal. App. 2d 239, 18 Cal. Rptr. 650. In the *Hughes* case, a policy had excluded losses resulting from surface waters. The insured's dwelling was constructed on a lot which abutted with a stream. The Plaintiffs' property suffered substantial damage during a time of high

waters in the creek, when the earth at the rear of their lot slid into the creek. The issue before the trial court was whether the cause of the earth slippage was the abnormally high waters or whether it was the result of a build-up of subterranean water pressure leading to the failure of the soil. The trial court found that the cause of the earth slippage was the build-up of subterranean water pressures, not an excluded risk, and awarded recovery under the policy. The District Court of Appeal in affirming that judgment ruled that the findings of the trial court must be interpreted as stating that the build-up of subterranean water pressure had caused the earth failure without any contribution to the damage by abnormally high surface waters in the stream.

The effect of the Supreme Court decision in *Sabella v. Wisler* is to eliminate that portion of the *Hughes* decision which seemed to require that the non-excluded peril be the cause of the loss without contribution from an excluded peril. Thus, the law of California may now be clearly stated to be that if a non-excluded peril triggers or sets in motion the events which lead to the loss, coverage will be afforded despite contribution from an excluded peril and despite the fact that an excluded peril may be the more immediate cause of the damage.

The present case was decided in the trial court prior to the Supreme Court decision in *Sabella v. Wisler,* while the case was still pending in the District Court of Appeal. Accordingly, Appellant's brief and much dis-

cussion in the trial court was devoted to the question of whether the terminology of Exclusion (g) of the Home Owner's Policy would exclude all kinds of "settling". Several pages of Appellant's Opening Brief are devoted to a discussion of that issue.

Although in the present case the trial judge concluded that the term "settling" should be limited to minor or ordinary settling, in view of the *Sabella v. Wisler* decision, this is no longer a problem.

Thus, in the present case, the trial judge found on undisputed testimony that:

> "The land beneath the structure consisted of compacted fill earth on top of uncompacted fill, resting on natural soil. The strata was so situated as to permit water to filter downward and to saturate the soil beneath the structures, and thereby to create an unstable condition of the soil. Such condition existed prior to issuance by defendant of both of its policies of insurance, but such condition was not known by any of the parties hereto until visible damage to the house occurred late in November of 1955, nor is there any evidence that said condition was capable of ascertainment prior to late in November of 1955.
>
> Such instability caused prior to and during the policy period an extensive subsidence of the soil beneath the dwelling and garage." [1 Tr. 32:9-23.]

This finding is fully supported. Thus, the only evidence on the subject establish that the precipitating cause of the instability of the earth beneath Plain-

tiffs' dwelling was the accumulation of underground water which had been impounded in the natural canyon underneath plaintiff's dwelling by the addition of compacted fill. There was no manifestation of damage for more than two years after the house was constructed and examination of borings made during the sinking of caissons but the repair work disclosed a great amount of sub-surface water which had created an unstable underlying soil. Dr. Stone, the geologist, in response to a question predicated upon his examination and upon the undisputed facts that damage was not manifested until November of 1955, stated that the sudden appearance of earth movement was consistent with his opinion as to the existence of sub-surface waters and he further testified:

> "If there was no water there, it is likely that we would have had very, very little subsidence, or very little compared to what actually occurred with the presence of the water." [2 Tr. 201:20-23.]

It is submitted, therefore, that any "settling" within the meaning of the New Zealand Policy, was not a proximate cause of the damage to Plaintiffs' dwelling, but was at most merely a cause contributing only in a very minor degree, and more accurately was the result of a non-excluded peril, the accumulation of sub-surface waters. Under such circumstances, there is clearly no merit to the contention of Appellant, that, as a matter of law, the loss to Plaintiffs' dwelling was caused by a peril excluded from the policy.

II.

Defendant's Contention That Plaintiffs' Loss Was Inevitable and Not Fortuitous and Therefore Not Covered, Is Contrary to California Law as Stated in Sabella v. Wisler.

Defendant contends that because the condition of instability had existed in the soil underlying Plaintiffs' property prior to the issuance of the Home Owner's Policy, the resultant loss was inevitable and hence not a fortuitous risk. No California decision is cited in support of that proposition.

An identical contention was rejected by the District Court of Appeal in *Snapp v. State Farm Fire & Casualty Co.* (1962), 206 A. C. A. 919, which ruled that the decisions relied upon by Appellant in its present Brief were not in point. In the *Snapp* case, there was evidence that the structure in question had been erected on improperly compacted fill. A contention identical with that made herein was made by the insurer in that case (which insurer incidentally was represented by the same counsel as herein). The District Court of Appeal ruled, as follows:

> "If sufficient information were available to geological experts, the possibility or probability of *all* earth movements might be forecast with accuracy. Further, after any movement of land has occurred it might be said to have been 'inevitable' with semantic correctness, but such 'inevitability' does not alter the fact that at the time the contract of insurance was entered into, the event was only a *contingency* or *risk* that might or might not occur within the term of the policy." 206 A. C. A. at p. 922.

The *Snapp* case was expressly approved in *Sabella v. Wisler,* which quoted with approval a portion of the language appearing hereinabove. Furthermore, it was pointed out in *Sabella v. Wisler* that despite the possible inevitability of movement as a result of the underlying geological formation, the interjection of waters into the uncompacted formation was "an unanticipated external event or casualty, operating to trigger the greatly accelerated action of possible inherent vices." (59 A. C. at p. 43.)

In the present case, although the possibility of damage because of the uncompacted underlying fill beneath the Lenoffs' Property was present from the time of construction, it was expressly found that the condition was unknown to any of the parties and was not capable of ascertainment prior to November of 1955. [1 Tr. 32:13-19.] Moreover, the proximate cause of the failure in the present case was accumulation of underground waters, a condition depending upon a number of variable and unforeseeable factors for its existence. There is no evidence that it could be anticipated that the waters would percolate to the location that they did beneath the Lenoffs' Property, that the amount and sources were to be expected, or that it could be foreseen that the uncompacted fill would result in the interjection of such waters into the unstable soil.

III.

The Trial Judge Properly Included the Costs of Repairing and Underpinning the Foundation Among the Costs of Repairing Plaintiffs' Dwelling.

Defendant contends that the Trial Judge erred in allowing recovery of the expense of repairing and stabilizing the foundation. Thus, it is urged, recovery under the policy is limited to repair consisting of replacement of damaged parts with materials identical to those existing before the damage occurred. By awarding damages for the cost of underpinning, Defendant argues, the Trial Judge required payment for a better foundation than had existed before the loss.

In *Pfeiffer v. General Insurance Corporation* (S.D. Cal. 1960), 185 F. Supp. 605, the insureds under a homeowners policy suffered damage to their dwelling from a landslide. The evidence showed that repairs to the structure would require expenditure of $8,000, but to stablize the soil beneath the house would require an expenditure of $23,000. As phrased by Judge Harris, the issue before the Court was whether the policy covering plaintiffs' "dwelling" covered the land underlying the dwelling. In holding that such coverage was provided, Judge Harris stated:

> "In the case at bar it is manifest that the land underlying the house must be encompassed within the word 'dwelling' unless the policy is to be interpreted as illusory. It appears to this court, and the court finds, that no amount of repairs to the present structure *alone* will cure the damage or replace the dwelling until the earth movement under the structure is stablized." (P. 608.)

The *Pfeiffer* case was cited and quoted from with approval in the decision of the California District Court of Appeal in *Hughes v. Potomac Ins. Co.* (1962), 199 Cal. App. 2d 239, 18 Cal. Rptr. 650, involving a similar contention. There, damage to the structure itself, exclusive of the underlying soil, amounted to only $50, while the cost of stabilizing the soil amounted to $19,000. In allowing recovery for the latter item, the District Court of Appeal stated:

> "Respondent correctly points out that a 'dwelling' or 'dwelling building' connotes a place for occupancy, a safe place in which to dwell or live. It goes without question that respondents' 'dwelling building' suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30 foot cliff. Until such damage was repaired and the land beneath the building stabilized, the structure could scarcely be considered a 'dwelling building' in the sense that rational persons would be content to reside there." (199 Cal. App. 2d at 249.)

The argument of Appellant in the present case fails to take into account the fact that the interjection of underground waters into the soil beneath the Lenoffs' home changed the character of the soil from that having merely a potential for instability to soil actually unfit to accommodate the dwelling. The testimony of the experts was that, in the absence of underpinning or similar stabilization, further damage to the dwelling would surely occur, and, in fact, collapse was very possible. Prior to the injection of underground waters, the Lenoffs' dwelling had a foundation which supported it without visible damage for more than two and one-half years. The repair work served simply to restore the dwelling to a condition of safety, and was accomplished without anything more than the expenditures necessary to achieve that condition.

IV.

Respondents Were Not Precluded by the Appraisal Award From Recovery of the Proper Measure of Their Damages.

Defendant urges that the appraisal award is conclusive as to the amount recoverable by plaintiffs to redress their loss. Although it is stipulated that the amount of repairs effected total $20,938.47, it is urged that recovery should be limited to $8,684.50, the amount fixed by the appraisers for repair of the structure without including costs of repairing and stabilizing the foundation. It is submitted, however, that the Trial Judge quite properly rejected such contention, because:

(a) The Appraisers, in Failing to Consider the Cost of Stabilizing the Underlying Soil, Imperfectly Executed Their Powers so That a Mutual, Definite and Final Award Was Not Made. (Calif. Civ. Code, Section 1288(d).)

The Supreme Court of California, as early as 1859, stated:

> "The rule is general, that arbitrators must pass upon all matters submitted or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But if the submission is general, of all matters in controversy, without specification it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void

in toto, and be set aside upon a proper showing of the omission."

Muldrow v. Norris (1959), 12 Cal. 331, 339.

In the recent case of *Hughes v. Potomac Ins. Co.* (1962), 199 Cal. App. 2d 239, 18 Cal. Rptr. 650, the California District Court of Appeal refused to be bound by an appraisal award which failed to include all items of repair to the dwelling. Thus, it was held:

> "Appellant also asserts that the appraisers' award of $50 for loss and damage to the 'dwelling' must be controlling. This position is untenable. The appraisers found that the cost of a retaining wall and fill was $19,000. The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy. The mere fact that they apparently considered the 'dwelling' to be limited to the house and attached garage did not deprive the court of its right to interpret the policy in a different manner." (199 Cal. App. 2d at 253.)

Although it is presumed that the award encompasses all matters before the abitrators, in view of the stipulation in the trial court that the award did not include the costs of stabilizing the foundation, the Trial Judge quite properly concluded that the award did not encompass all items before the abitrators, as, indeed, an examination of the award itself discloses.

(b) Had There Been an Attempt by the Arbitrators to Cover the Costs of Stabilizing the Foundation, the Amount of the Award Would Have Been so Grossly Inadequate as to Amount to Constructive Fraud. (Calif. Civ. Code, section 1288(a).)

There is substantial authority for the rule of law that a grossly inadequate award may so substantially impair the legal rights of the injured party as to constitute constructive fraud. Although it is unnecessary to rule upon that issue in the present case, in view of the stipulation that the appraisers had omitted to include the cost of stabilizing the foundation in their award, the gross inadequacy of the award to include an amount sufficient to compensate plaintiffs for such expense would justify relief on this basis.

See:

Hetherington v. Continental Ins. Co. of New York (1941), 311 Ill. App. 577, 37 N. E. 2d 366;

Harrington v. Agricultural Ins. Co. (1930), 178 Minn. 510, 229 N. W. 792;

6 Corpus Juris Secumdum, Arbitration and Award, Sec. 90 (and cases cited).

(c) Appellant Is Estopped to Rely Upon the Conditions of the Policy It Has Breached by Its Repudiation of Liability.

Although Appellant made demand upon Respondents to comply with the condition of the policy requiring appraisal, it thereafter repudiated the policy and all liability thereunder, including the amount fixed by the appraisers. Its position now, essentially, is that although it has refused to honor the award, and thus

breached its contract, it will hold Respondents to performance of that condition.

It is firmly settled under California law, however, that one party to a contract cannot compel another to perform when he himself is in default.

Rathbun v. Security Mfg. Co. (1928), 82 Cal. App. 793, 796, 256 Pac. 296;

Karales v. Los Angeles Creamery Co. (1918), 36 Cal. App. 169, 171 Pac. 821;

Wood Curtis & Co. v. Seurich (1907), 5 Cal. App. 252, 254, 90 Pac. 51;

Calif. Civil Code, Section 1439.

Thus, it is held that an insurer who denies liability, waives compliance with the arbitration clause, and cannot rely upon such clause to limit or bar recovery.

Farnum v. Phoenix Ins. Co. (1890), 83 Cal. 246, 23 Pac. 869;

Bass v. Farmers Mut. P. Fire Ins. Co. (1937), 21 Cal. App. 2d 21, 68 P. 2d 302.

V.

The Trial Judge Properly Held That Plaintiffs' Damages Were Incurred During a Period of Continuing Loss, and Appellant's Responsibility Could Not Be Avoided by Its Purported Cancellation.

The Trial Judge found that the damages manifested in 1955 and 1957 were both parts of a continuing loss. Such finding is fully justified, in view of the testimony concerning the manner in which the instability of the underlying soil was created. Thus, from the testimony of the geologist, it was made clear the underground

water continued to accumulate and infiltrate the loose soil, so as to maintain a condition of instability. Damage to the structure would continue to occur until the foundation was stabilized by either soil grouting or beam-caisson underpinning.

Despite attempts of Appellant to marshall decisions in other jurisdictions for the purpose of developing a rule of non-liability after attempted cancellation by an insurer in a progressive and continuing loss situation, the rule applicable in California has been clearly enunciated in a situation almost identical with the facts of the present case.

Thus, in *Snapp v. State Farm Fire & Cas. Co.* (1962), 206 A. C. A. 919, the insured's property was constructed upon fill, which commenced to move laterally during the policy term, thereby damaging the structure and foundation. The trial court awarded damages limited to the amount actually sustained prior to the expiration date of the policy. In reversing this holding of the trial court, the appellate court stated:

> "While the loss sustained up to a given date may have been 'ascertainable,' the question whether the liability of the insurer was *'terminable'* on such date, or whether the defendant was liable for the 'continuing damage or loss' is a *legal* rather than *factual* issue. We have concluded that the trial court erred in deciding this issue.
>
> To permit the insurer to terminate its liability while the fortuitous peril which materialized during the term of the policy was still active would not be in accord either with applicable precedents or with the common understanding of the nature

and purpose of insurance; it would allow an injustice to be worked upon the insured by defeating the very substance of the protection for which his premiums were paid.

Once the contingent event insured against has occurred during the period covered, the liability of the carrier becomes *contractual* rather than *potential* only, and the sole issue remaining is the extent of its obligation, and it is immaterial that this may not be fully ascertained at the end of the policy period." (206 A. C. A. 923.)

Accord:

Harman v. American Cas. Co. (1957, S.D. Cal.), 155 F. Supp. 612.

In the present case, until the foundation of the Lenoffs' home and supporting soil were stabilized, additional manifestations of damage were certain to occur. In such circumstances, Appellant could not unilaterally terminate its contractual obligation arising upon the initial manifestations of damage.

VI.

Plaintiffs' Loss Was Capable of Being Ascertained on or Before the Time of Filing Suit, and the Trial Court Properly Awarded Interest From That Date.

Under Condition 13 of the policy, Plaintiffs' loss was payable 60 days after filing proof of loss or the making of an award. Proof of loss was filed June 28, 1956, and the award of the appraisers was made on September 1, 1956. A denial of liability was made shortly after such award.

Under Section 3287 of the California Civil Code, interest is allowable where the amount of the defendant's obligation is certain or capable of being made certain by calculation. California decisions are liberal in interpreting the phrase, "capable of being made certain by calculation."

In *Koyer v. Detroit Fire and Marine Insurance Co.* (1937), 9 Cal. 2d 336, 70 P. 2d 927, the insured premises were totally demolished by earthquake. The policy required appraisal of the loss, and, although attempts were made to accomplish such appraisal, it was never consummated. Proceeds of the policy were payable 90 days from filing proofs of loss. Rejecting the insurer's contention that interest should be computed only from the time of judgment, rather than before that time, the Supreme Court held:

> "Whether interest was chargeable prior to judgment depends upon the application of section 3287 of the Civil Code, under which interest runs on claims for damages certain or capable of being made certain from the date the right of recovery is vested. If, therefore, the amount of plaintiff's loss was capable of being made certain by calculation, interest was allowable from July 12, 1933, when the loss became payable. It would seem to admit of no doubt that an ordinary fire or earthquake loss is adjusted by calculation, whether it be a total or partial loss." (p. 345.)

Chase v. National Indemnity Co. (1954), 129 Cal. App. 2d 583, 278 P. 2d 681, involved a policy of insurance on a truck and van which were destroyed in a collision. The insurer denied coverage and an ac-

tion ensued. In rejecting the contention that interest should not have been awarded from the date payment was due under the policy, but instead from only the time of judgment, the court stated:

> "The reason for denying interest on claims is that where the person liable does not know what sum he owes, he cannot be in default for not paying. (Citation.) When the exact sum of the indebtedness is known or can be ascertained readily, the reason suggested for the denial of interest does not exist. (Citation.) In the instant case the evidence was undisputed that the equipment was totally destroyed. National took charge of the salvage and could ascertain from it and from list prices on the equipment what the fair market value was on the date of loss. Resort may be had to appraisers if necessary (Citation.), and other means to arrive at fair market value. The mere unwarranted denial of the validity of the contract, or liability thereunder, on the part of the insurance company will not have the effect of defeating the right to recover interest otherwise recoverable." (129 Cal. App. 2d p. 865.)

See also:

> *Snapp v. State Farm Fire & Cas. Co.* (1962), 206 A. C. A. 919, 923.

There does not appear to be any valid reason why the amount necessary to stabilize the underlying soil could not have been ascertained by Defendant herein prior to the filing of suit, and an appraisal had already been made of the costs of repairing the structural damage. Any failure to make such ascertain-

ment was not the fault of Plaintiffs, but was the fault of Defendant in denying responsibility for the entire claim.

Defendant does not suggest when damages were capable of ascertainment, other than that it was not before October 26, 1956, when suit was filed. Although Plaintiffs are confident that such amount could have been ascertained by that date, certainly they were ascertainable, and had actually been ascertained, by September of 1959, when repairs were accomplished. No quarrel has been made with the items of repair, and, indeed, the amounts thereof were stipulated to at the trial as being reasonable.

Conclusion.

It is submitted that the Trial Judge correctly determined all issues, and that the judgment should be affirmed.

Dated this 26 day of February, 1963, at Los Angeles, California.

Respectfully submitted,

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Certificate.

I certify that in the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that this Brief, in my opinion, does comply therewith.

VERNON G. FOSTER

Nos. 17,823 and 17,836-17,841

In the United States Court of Appeals for the Ninth Circuit

F. C. VAUGHAN and MATTIE VAUGHAN, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petitions For Review of the Decisions of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R.430-454) are officially reported in 36 T.C. 350.

JURISDICTION

These petitions for review (R.482-521) involve federal income taxes for the taxable years 1948 to 1951, inclusive. Notices of deficiencies were mailed by the Commissioner of Internal Revenue to the taxpayers on December 29, 1954, and on June 19, 1957.

(R. 31,36.) Within ninety days thereafter (on March 25, 1955, and September 16, 1957, respectively), the taxpayers filed petitions with the Tax Court for redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939 (R. 4-30, 36-53). The cases were consolidated for trial (R. 535, 538) and the decisions of the Tax Court were entered on October 4 and 5, 1961 (R. 466,475-481). The consolidated cases (R.2) are brought to this Court by petitions for review filed on December 29, 1961 (R. 482-521), within the three-month period prescribed by Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of the Code.

QUESTION PRESENTED

Whether there was substantial evidence to support the Tax Court's determination that the heifers in taxpayers' herd of cattle twenty-four months of age or younger were not, under the particular circumstances here involved, held for breeding purposes within the meaning of Section 117(j)(1) of the 1939 Code, so that the gain derived from the sale of the heifers constituted ordinary income, not capital gain.

STATUTES AND OTHER AUTHORITIES INVOLVED

These are set forth in the Appendix, *infra*.

STATEMENT

The Tax Court's findings of fact (R. 433-445) based upon a stipulation (R. 56-77) with exhibits

nd extensive testimony (R. 125-429), may be summarized as follows:

The taxpayers are F. C. Vaughan and his two ons, Floyd C. and P. W. Vaughan. In 1940, they rganized a partnership known as Vaughan Bros. for he purpose of operating a cattle ranch near Bruneau, Owyhee County, Idaho. Vaughan Bros. owned in fee imple about 3,600 acres of land and held grazing ights from the federal and state governments on pproximately 250,000 acres. The partnership operated the ranch and conducted livestock operations ontinuously from 1940 to May, 1945, when it contracted to sell the ranch, range rights and cattle. The purchasers undertook operation of the ranch and sold a part of the cattle. However, because of difficulties encountered in obtaining financing, the sale was rescinded with the partnership's consent, and the ranch, range rights and remaining portion of the herd were returned to Vaughan Bros. in October, 1945. (R. 433.)

In May, 1946, Vaughan sold the ranch, rangeland and range rights to Milford J. Vaught (hereinafter referred to as "Milford"). Since Milford was unable and unwilling to purchase the cattle then on the range properties he had just purchased at the price asked, he entered into, about the same time, a "lease agreement" with F. C. and Floyd C. Vaughan as lessors whereby Milford and his wife, as lessees, undertook to "operate" the cattle for a five-year period ending April 1, 1951, on such properties. (R. 434-435.)

The agreement recited that the lessors, who were the owners of certain branded Hereford cattle (classified as to cows, heifers, calves and bulls) and Milford contemplated the "operation of the cattle," together with any increase and accretion thereto, as "an operating cattle unit" in connection with the described range and properties. (R. 434.)

Under the terms of the agreement, the Vaughans leased and let to the lessees the cattle, replacements, and increase, title to which remained in the Vaughans (except for cattle sold) for operation by the lessees for the five-year term. No partnership was intended; neither party was to be liable for the debts of the other, and Milford was to operate as an independent contractor. Milford agreed to care for and operate the herd as a unit and to maintain it at its initial size and quality by increase, or by purchased replacements paid for jointly by the parties. Range fees and costs of bulls for the herd were to be borne equally by the parties; Milford agreed to furnish all feed and labor necessary for operation of the herd and to pay all operating expenses. No cattle were to be removed from the county "except in the normal course of the marketing of the beef and other cattle which shall be produced for sale or which in the normal operation of said herd should be sold from the culling thereof." (R. 434-436.)

The parties each were to receive one-half of the proceeds from the sale of cattle produced from the herd. Milford, under the agreement, was authorized to sell and market cattle from the herd as were pro-

duced for market, as he judged to be in the interest of the parties; however, he was to confer and counsel with the Vaughans in this regard. Checks and drafts in payment of sales were to be made payable jointly to F. C. Vaughan and Milford. (R. 436.)

Upon termination of the agreement, the Vaughans were to receive replacement of the herd in the amounts and classes of cattle listed in the agreement. Any surplus cattle were to be divided equally between the parties. (R. 436.)

The cattle delivered to Milford under the agreement were as follows (R. 434):

790	range cows.
306	heifers coming two years old.
102	weaner calves.
128	heifers,
156	sucking calves.
11	registered bulls, 2 years old.
3	registered bulls, 3 years old.
4	registered bulls, 4 years old.
7	registered bulls, 5 years old.
13	aged bulls.
1, 520	total

At the time Milford undertook to operate the Vaughan herd, the range and grazing rights allowed for the grazing of about 2,100 head of count cattle,[1] although Milford subsequently received permission to graze additional count cattle on the federal grazing lands. Count cattle taken over by Milford in 1946 totalled 1,364 animals. There were 1,837 ani-

[1] Count cattle include all cattle except calves less than six months of age on January 1 of the year for which the federal grazing permit is issued. (R. 437.)

mals on hand at the close of the term in 1951. (R. 437, 440, 444.)

During the taxable years in issue, the cycle of operation of the herd commenced about March 15, when dry cows, cows with sucking calves, weaner heifers, older heifers and steers were turned out on the range. "Calvy" heifers and cows were held a bit longer before they were turned out on the range with the rest of the herd. The herd bulls were not turned out until about May 1. The range was an "open" range as distinguished from a fenced range or irrigated pasture operation. Heifers could not be segregated from the rest of the herd. (R. 437-438.)

All cattle remained on the open range until November 15. During this period, all cows and heifers were exposed to the herd bulls. Heifers normally begin to breed when 14 to 15 months old, although on rare occasions they are capable of breeding at 8 or 9 months of age. With a gestation period of 9 months' duration, few heifers drop calves before reaching the age of 24 months. Furthermore, the characteristics upon which a determination is made as to whether a heifer will be valuable as a replacement in the herd do not develop until the heifer is 18 to 24 months old. (R. 438-439.)

In June of each year, a calf roundup took place, at which time calves were located and branded. In August or September, when the cattle were in best condition, the beef roundup occurred for the purpose of selecting the animals intended for sale as beef cattle. Not all animals were gathered in the beef roundup.

Good cows, particularly those obviously with calf, were not rounded up. Many cows, however, were gathered; more, in fact, than were intended for sale. Practically all the heifers were gathered, as were all the steers. Either F. C. or Floyd C. Vaughan was present at the beef roundup during each year Milford operated the herd. (R. 438, 440.)

After the cattle had been gathered and the unbranded calves branded and returned to the range, the steers, cows and heifers were segregated in separate pastures. The number, weight and approximate market price of the steers were calculated. Then there were culled from the cows those animals less desirable for retention in the herd that were to be sold. Next, enough heifers were selected for sale which, with the proceeds from the sale of the steers, would produce sufficient income for continued operations by Milford. Heifers which were obviously pregnant were placed in the breeding herd because buyers of feeder cattle would not buy them. The pregnancy of heifers became apparent in about the seventh month of the gestation period. (439.)

Up to 95% of all yearly sales took place in September or October of each year, and most of them were made to buyers who came to the ranch; the rest of the cattle were shipped to markets in Idaho. (R. 439.)

From then until February of the following year, all the cattle were gathered from the open range for winter quartering and the cattle were segregated by classes, the bulls being separated from the heifers and

cows during March and April. The cycle ended with the birth of most calves in February and March. (R. 439-440.)

During the taxable years in issue, bulls, cows and heifers were sold from the Vaughan herd, as well as steers. (R. 441, 442.)

In order to permit Milford sufficient funds to operate the herd, the following sales of heifers occurred during the term of the agreement (R. 439, 442):

Year	Number	Age in Months	
		Over	Not Over
1946	133	24	28
1947	135	24	36
	1	Not shown by record	
1948	94	18	24
	1	12	15
	1	Not shown by record	
1949	206	15	18
	1	10	12
1950	89	14	18
	99	18	24
	53	12	15
	1	18	22
	1	17	20
	2	24	28
Total	817		

In 1948, heifer sales constituted approximately 20% of total sales and 30% of steer sales. For 1949, these percentages were 28% and 62%, respectively; in 1950, they were 37% and 75%, respectively. (R. 442.)

During the contract period the number of heifers branded totaled approximately 1,636 animals. (R. 442.)

At the termination of the agreement on April 1, 1951, Vaughan Bros. did not have sufficient facilities to accommodate the replacement herd, together with the share of increase to which it was entitled, and it was unable to reach an agreement with Milford for continued operation of the herd. Selection of the replacement herd and division of the increase took place during the first quarter of 1951. The partnership, during the first four months of the same year, sold to Milford one group of 170 heifers ranging in age from 12 to 18 months, and another group of 50 heifers ranging in age from 20 to 24 months. Of a certain number of cattle removed to Oregon in 1951 at, or in anticipation of, the expiration of the contract with Milford, the partnership sold a third group of 60 heifers ranging in age from 12 to 15 months, to Robert F. Vaughan. (R. 443-445.)

The Commissioner asserted deficiencies in income taxes against the taxpayers for the years involved based upon a determination that the gain derived from the sales of all animals during the term of the "lease agreement" should be treated as ordinary income. In the Tax Court, the Commissioner argued that the "lease agreement" created a lessor-lessee relationship between the taxpayers and Milford, so that the income derived by the partnership was ordinary rental income. Alternatively, the Commissioner argued that the animals were not held for breeding purposes, but for sale to customers in the ordinary course of taxpayers' business and that the gain derived from the sales thereof was likewise ordinary

income. The Tax Court rejected the first argument of the Commissioner; however, it decided that all bulls, cows, and heifers over 24 months of age had been held by the partnership for breeding purposes, and hence capital gain treatment was permitted with respect to the proceeds from the sale of such animals. As to these sales, there is now no issue before this Court.[2] The Tax Court further held that the proceeds from the sales of all heifers 24 months of age or younger should be treated as ordinary income since such heifers were held primarily for sale to customers in the ordinary course of business. (R. 446-454.) From this latter ruling, the taxpayers have brought their respective petitions for review. (R. 482-521.)

SUMMARY OF ARGUMENT

During the years in issue, the taxpayers were in the business of raising cattle for sale in the beef market. The animals actually sold in the market included a substantial number of heifers as well as steers. The sale of these heifers was necessary each Fall in order to provide the manager of taxpayers' herd with sufficient operating funds for the coming year.

The provisions of the Revenue Code here pertinent provide that gain on the sale of livestock is to be treated as capital gain if such livestock is held by the particular taxpayer for draft, breeding, or dairy purposes. If, on the other hand, the livestock is held

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[2] Sales of steers were never in issue since, by definition, a steer cannot be held for breeding purposes.

primarily for sale to customers in the ordinary course of the taxpayer's trade or business the gain is ordinary income.

The issue here presented is one of fact. The Tax Court's conclusion, based upon the facts of record, that only those heifers over 24 months of age were held for breeding purposes is correct. The record shows that until they reached that age, they had not been introduced into the breeding herd. Heifers below that age were not culled from the herd and sold because they were undesirable for breeding. In fact, whether or not they would be valuable as replacements in the breeding herd could not be known until they were 18 to 24 months old. Younger heifers that were sold in the beef market were selected according to their value to beef cattle buyers. These buyers were not interested in buying heifers that were pregnant, and the fact of their purchases is strong evidence that taxpayers' heifers were not pregnant at the time of their sale. Thus the incidental exposure of taxpayers' heifers to the bulls on the open range does not establish that the heifers had been introduced into the breeding herd.

At the conclusion of their agreement with the manager of the herd, the taxpayers had to sell part of their heifers because they did not have sufficient rangeland to sustain them. These heifers also had been held primarily for sale as beef cattle since they had not reached the age of 24 months. While the immediate reason for sale was the unavailability of grazing land, it is clear that prior to sale they were

not held for breeding purposes. Like the steers which were sold earlier, they were a part of taxpayers' money crop. That a partial reduction of the herd was necessary does not convert into capital gain what is in fact ordinary income.

The Tax Court's division of the heifers according to their ages at the time of sale is supported by the decisions. Moreover, the age selected was reasonable because until that time most of the heifers could not normally produce calves. In addition, the characteristics for determining whether a particular animal would be valuable as a replacement in the breeding herd did not develop until that time. In the absence of sufficient evidence to show the purpose for which each animal was held, the method employed by the Tax Court for determining which animals were held for breeding purposes and which were held for sale in the ordinary course is clearly correct.

ARGUMENT

There Was Substantial Evidence To Support The Tax Court's Determination That The Heifers In Taxpayers' Herd Twenty-four Months Of Age Or Younger Were Under The Particular Circumstances Here Involved Held Primarily For Sale To Customers In The Ordinary Course of Taxpayers' Beef Cattle Operations

The single issue in this case is whether the gain derived from the sale of heifers twenty-four months of age or younger owned by the taxpayers should be reported as capital gain or as ordinary income. Before turning to the basic facts, it will be helpful to review briefly the pertinent statutory provisions and

the situations in which they were intended to apply.

Section 117(a) of the Internal Revenue Code of 1939 (Appendix, *infra*) expressly excluded from the definition of "capital assets" property held by a taxpayer primarily for sale to customers in the ordinary course of his trade or business, as well as depreciable property used in the trade or business. In the Revenut Act of 1942, c. 619, 56 Stat. 798, Section 151(b), the Congress added Section 117(j) (Appendix, *infra*) to the Code. This provision afforded special treatment in situations where recognized gains on the sale or exchange of "property used in the trade or business" exceeded the recognized losses from such sales or exchanges. The gains were treated as capital gains even though the assets were not "capital assets" within the meaning of Section 117(a). Where the net result was a loss, however, it was treated as an ordinary loss. Significantly, Section 117(j) was drafted so as to exclude from the definition of "property used in the trade or business" any property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. As a result, the gain on these latter sales is treated as ordinary income. The net effect of Section 117(a) and (j) is to permit capital gain on the sale of property used in the trade or business unless such property is held primarily for sale to customers. Surrey and Warren, Federal Income Taxation (1954), p. 528.

For several years after the enactment of Section 117(j), there was considerable dispute whether all livestock held for draft, dairy or breeding purposes

was property used in the trade or business, or whether there were instances in which such animals were held primarily for sale to customers. See *Albright* v. *United States*, 173 F. 2d 339 (C.A. 8th); *United States* v. *Bennett*, 186 F. 2d 407 (C.A. 5th); *Emerson* v. *Commissioner*, 12 T.C. 875; *Fawn Lake Ranch Co.* v. *Commissioner*, 12 T.C. 1139; *Flato* v. *Commissioner*, 14 T.C. 1241; *Kline* v. *Commissioner*, 15 T.C. 998. After the adverse decisions in the *Albright* and *Bennett* cases, *supra*, the Commissioner, in Mim. 6660, 1951-2 Cum. Bull. 60, re-examined his position with respect to Section 117(j) and stated (p. 61):

> It is the present position of the Bureau that gains derived from the sale of dairy, draft, or breeding animals are to be recognized as coming within the purview of section 117(j) of the Internal Revenue Code if the taxpayer establishes that the particular animals sold were actually used for dairy, draft, or breeding purposes for substantially their full period of usefulness. If such animals are sold prior to such full period of usefulness, the taxpayer must show that they were added to the herd for substantial use in such herd and not temporarily with the object in view of an early sale.

The requirement that the animals must be used in breeding for substantially their full period of usefulness gave rise to new difficulties, and in Section 324 of the Revenue Act of 1951, c. 521, 65 Stat. 452 (Appendix, *infra*), Section 117(j) was amended to provide that "property used in the trade or busi-

ness" also included "livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition." [3] The exclusion for property held primarily for sale to customers was, however, equally applicable to livestock under this amendment.

It is apparent from the Senate Report accompanying this legislation (S. Rep. No. 781, 82d Cong., 1st Sess., pp. 41-42 (1951-2 Cum. Bull. 458, 487-488) (Appendix, *infra*)) that the language "regardless of age" was inserted into the statute to overcome the effect of Mim. 6660 and to preserve capital gain treatment even though an animal held for breeding purposes was sold before its breeding usefulness had ended. Although the purpose for which the livestock is held is crucial under the statute, Congress did not intend to allow capital gain on the sale of animals which had not yet become a part of the breeding herd. *Gotfredson* v. *Commissioner*, 217 F. 2d 673 (C.A. 6th); *Fox* v. *Commissioner*, 198 F. 2d 719 (C.A. 4th). This distinction is essential to a proper understanding of the present case. The age of the

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[3] Section 324 of the Revenue Act of 1951, which added this provision to Section 117(j), was made applicable to taxable years beginning after December 31, 1941, except that the holding period was extended from 6 to 12 months only with respect to taxable years beginning after December 31, 1950. In the present case, therefore, the taxable years 1948 to 1950 were subject to the 6-month holding period, and 1951, to the 12-month period.

After the enactment of this provision, the Commissioner revoked Mim. 6660. Mim. 6776, 1952-1 Cum. Bull. 71.

heifers is, indeed, unimportant (except for the holding period requirement) once it is determined that they have been introduced into the breeding herd. But to permit the taxpayers to maintain (Br. 27) that all of those animals became part of their breeding herd at birth simply because they ran with the bulls would enable them to treat young and even newborn heifers as a part of the breeding herd even though it is clear a portion was held primarily for sale to customers. This would certainly be beyond the purpose of Congress in amending Section 117(j) in 1951.

Whether livestock is held for breeding purposes or primarily for sale to customers is a question of fact to be determined from all the relevant circumstances. *United States* v. *O'Neill*, 211 F. 2d 701 (C.A. 9th); *Gotfredson* v. *Commissioner*, *supra*; *Fox* v. *Commissioner*, *supra*. The taxpayers were engaged in the business of raising cattle for sale on the beef market. Their income was derived primarily from the sale of steers (R. 142, 442-443) which were sold to cattle buyers after the beef roundup in the Fall of each year (R. 438-439). The gain from the sale of these animals was just as much a part of their ordinary business income as the sale of dairy products is the source of ordinary income from the operation of a dairy herd. *Fox* v. *Commissioner*, *supra*.

When Milford undertook to operate the Vaughan herd in 1946, he soon found that it was impossible for him to operate as economically as the Vaughan Bros. had. Part of this, he testified, was due to the fact that it became necessary to employ and pay a

hired hand to assist him, and part was due to the general rise in living expenses. (R. 290, 291). In addition, the agreement required Milford to pay virtually all expenses connected with the operation of the herd even though he was to receive only one-half the proceeds from cattle sales. (R. 85.) Since the money derived from these sales was his only source of income (R. 289), he had to sell more animals *as beef cattle* in order to obtain operating funds. This became apparent to him in the very first Fall of his management. (R. 335.) Thus, with the assistance each year of one or more of the taxpayers (R. 440), Milford selected and sold heifers as well as steers in the beef market. In 1948, 96 heifers and 301 steers were sold. The next year the number of heifers sold increased to 207, while steers totaled 287. In 1950, Milford sold 245 heifers and 289 steers. (R. 443.) As the Tax Court stated (R. 452), "The number of heifers sold each year was determined by the anticipated requirement by Milford of operating funds for the coming year." The percentage of heifer sales to total sales during the period 1948-1950 increased from 20% to 37% (R. 442), so that it is apparent that a substantial part of the yearly income derived from the operation of the herd is attributable to this source. Moreover, the sale of heifers was not an unprofitable endeavor, for as Mr. Anderson, a cattle buyer and feeder, testified, this part of the State of Idaho "has always been a heifer area" (R. 384); he himself purchased primarily cows and heifers for his meat packing business rather than steers (R. 383).

The taxpayers concede (Br. 25) that the reason heifers were sold during the contract term was to provide Milford with operating funds. What they fail to perceive is the effect this fact has on their claim (Br. 27) that all heifers in the herd were held for breeding purposes from birth. We do not question that a portion of all the animals was held for breeding purposes. The Tax Court explicitly found that all bulls and cows culled from the herd were held for breeding purposes (R. 441), as well as those heifers over 24 months of age (R. 443). But the need for operating funds was such that the younger heifers were held for the same reason as the steers; namely, for sale on the beef market in the ordinary course of the taxpayers' operations. Compare *Cole* v. *United States*, 138 F. Supp. 186 (E. D. Ill.). An animal is not necessarily a member of the breeding herd merely because it is suitable for that purpose, or even because negligible breeding use may be made of it. Treasury Regulations 111 (1939 Code), Section 29. 117-7(c) (Appendix, *infra*).

The taxpayers contend that it was their intention to restore the herd to its original size, and that Milford treated all heifers as members of the breeding stock so that he could obtain a herd of his own at the end of the contract term. (Br. 24, 27.) Their intention, however, is unsupported by the record facts. During the term of the agreement with Milford, the number of animals increased from 1,520 to 1,837 (R. 434, 444), considerably less than the operating capacity of the ranch, which was 2,100 animals (R.

437). Heifers branded during the same period totalled 1,636 animals; yet fully one-third of these were sold between 1948 and 1950 as beef cattle. (R. 443, 450.) In other words, the taxpayers were selling in the ordinary course of business a substantial part of the very same animals which they acknowledge (R. 161-162) were essential if the herd was to increase.

Additional support for the decision below can be drawn from the manner in which the heifers were selected for sale. The Tax Court found (R. 452) that "The designation of particular animals to be sold was based upon a determination of which animals buyers would purchase." The overriding element was the need for operating funds. As Milford testified (R. 289), after the income from the sale of steers and culled cows had been computed, it was necessary to sell heifers as well. He clearly stated (R. 357) that he was forced to sell even "good heifers"—that is, heifers which were otherwise suitable for introduction into the breeding herd. Mr. Anderson testified (R. 389) that he would not purchase any heifers which were carrying unborn calves, and his testimony is supported by that of F. C. Vaughan (R. 425). The heifers sold were not culled from the herd because they were unsuitable for retention, as in *McDonald* v. *Commissioner,* 214 F. 2d 341 (C.A. 2d), a case heavily relied upon by the taxpayers. (Br. 17-18, 29.) Instead, they were selected according to their desirability by the prospective purchasers. *Clark* v. *Commissioner,* 27 T.C. 1006, 1012.

In the absence of sufficient evidence to ascertain the reason for which each animal was held, the Tax Court, following *Fox* v. *Commissioner*, *supra*, separated the heifers at the 24-month age. However, this point of demarcation was not arbitrarily chosen. Milford testified (R. 344) that a heifer usually commences breeding at about 14 or 15 months. Since the gestation period lasts nine months (R. 438), most heifers did not produce a calf until they were approximately two years old. He also stated (R. 345-346) that a heifer can be considered a useful member of the herd at that age. In addition, the Tax Court found (R. 439) that "The characteristics upon which a determination is made as to whether a heifer will be valuable as a replacement in the herd do not develop until the heifers are 18 to 24 months old." F. C. Vaughan stated (R. 412) clearly that the culling of heifers was not satisfactory until they were 15 to 23 months old. This effectively disposes of taxpayers' argument (Br. 29) that mere exposure to the bulls at an earlier age was equivalent to holding these animals for breeding purposes. Thus, in the light of these and the other factors mentioned below, it is clear that until they reach the age of 24 months, the heifers could not be considered as being held for breeding purposes. See also, *Gotfredson* v. *Commissioner*, *supra*; *Biltmore Co.* v. *United States*, 228 F. 2d 9 (C.A. 4th); *Greer* v. *Commissioner*, 17 T.C. 965, 972-973. Ordinarily, the purpose for which an animal is held is shown by its use (Treasury Regulations 111 (1939 Code), Section 29.117-7(c)), though that is not the sole criterion. In this case, it is clear

that most heifers would not produce a calf—and thereby increase the size of taxpayers' herd—until they were two years old. (R. 243.) Exposure to the bulls from birth is particularly insignificant here because this herd was run as an open range operation; since no fences were used, segregation of the heifers from the bulls was impossible. (R. 437-438.) Taxpayers' contention that the heifers were always held for breeding purposes simply cannot be sustained on the fact of exposure alone. Moreover, it is clear that there was nothing to indicate that the heifers which Milford sold were pregnant for had they been there would have been no market for them as beef cattle. (R. 438-439.)

The principal cases relied upon by the taxpayers (Br. 15-22) are distinguishable. In some of them (*Albright* v. *United States*, 173 F. 2d 339 (C.A. 8th); *United States* v. *Bennett*, 186 F. 2d 407 (C.A. 5th)) the animals were culled from a dairy herd or breeding herd and sold after their usefulness therein had ended. In others (*McDonald* v. *Commissioner*, *supra; Miller* v. *United States*, 98 F. Supp. 948 (Neb.)), they were removed from the breeding herd because they were physically inferior to animals of a similar age. In *Pfister* v. *United States*, 102 F. Supp. 640 (S. Dak.), the District Court concededly held that heifers were members of the breeding herd from birth. However, the appellate opinion (*United States* v. *Pfister*, 205 F. 2d 538, 542 (C.A. 8th)) seems to state quite clearly that the taxpayer maintained two herds, one for breeding and one for sale

in the ordinary course of business. Similarly, in *Estate of C. A. Smith* v. *Commissioner*, 23 T.C. 690, the taxpayer maintained two herds, and it was undeniable that the animals sold came from the breeding herd alone. In *O'Neill* v. *United States*, (S. D. Cal.), decided June 16, 1952 (52-2 U.S.T.C., par. 9462), affirmed *per curiam*, 211 F. 2d 701 (C.A. 9th), the heifers were intended for breeding at the age of two years as in prior years, but were sold because of inadequate rainfall after they reached that age. In the case at bar, the younger heifers were not held for breeding purposes until they were 24 months of age, but on the contrary were intended to be sold so as to permit the payment of operating expenses.

Taxpayers also contend (Br. 31-39) that the heifer sales in 1951, at the end of their contract with Milford, constituted a partial liquidation of the herd so that capital gain treatment is required.

In January, 1951, the taxpayers and Milford began to divide the animals in accordance with the terms of their agreement. This task was completed in April of the same year. However, the taxpayers did not have sufficient land to run all of the cattle to which they were entitled. A search to find suitable facilities had been fruitless, and no agreement could be reached with Milford to accommodate a part of the cattle. (R. 443-444.)

Accordingly, the taxpayers had to sell some of the livestock. In the first four months of 1951, Milford purchased from them a number of cows, bulls, steers and suckling calves. He also purchased one group of

50 heifers that were 20 to 24 months old, and another group of 170 heifers, ranging from 12 to 18 months of age. The Tax Court found that only the cows and bulls were held for breeding purposes. (R. 444.)

The taxpayers had also removed a number of animals to Oregon where they owned another ranch (R. 200), and where they also leased additional land (R. 201). Of these animals, they subsequently sold 202 cows and 100 suckling calves to Mr. Barlow, a cattle rancher. (R. 201-202.) They also sold to Robert F. Vaughan [4] 52 steers, and 60 heifers ranging in age from 12 to 15 months. The Tax Court found that only the cows sold to Barlow were held for breeding purposes. (R. 444-445.)

All of the heifers sold to Milford and to Robert F. Vaughan were 12 to 24 months old, so that they had been managed by Milford for at least a year before the taxpayers disposed of them. Like the heifers of similar ages sold from 1948 to 1950, these animals were not held for breeding purposes until they reached the age of 24 months. The fact, upon which the taxpayers so strenuously rely, that they were forced to sell these animals is of no material consequence. The immediate reason for sale is not the crucial factor; the essential question is the reason for which the animals were held *prior* to sale. Ordinary inventory or stock in trade is not converted into a capital asset simply because the taxpayer finds himself unable to retain it. *Grace Bros.* v. *Commis-*

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[4] He was a son and brother to the taxpayers, but is not a party to this action. (R. 210.)

sioner, 173 F. 2d 170, 178 (C. A. 9th). What was sold here in 1951 was not a partnership interest (*Hatch's Estate* v. *Commissioner*, 198 F. 2d 26 (C. A. 9th) but individual assets held by the partnership. See *Williams* v. *McGowan*, 152 F. 2d 570 (C. A. 2d). Furthermore, not all of these assets were sold at one time. Under these circumstances, it is essential to look at the character of each item sold. It is in this view of the case that the Tax Court's statement (R. 454) that conditions were the same in 1951 as in earlier years is entirely correct. By focusing on the immediate reasons for sale (Br. 37), the taxpayers have overlooked the fact that these heifers had not yet become members of the breeding herd, but were held primarily for sale to beef cattle buyers. They bore a relation to the breeding members of taxpayers' herd in somewhat the same manner as an orange crop is related to the orange trees from which it comes. Indeed, the Supreme Court has specifically drawn this comparison in *Watson* v. *Commissioner*, 345 U.S. 544, 548, fn. 5, and has approved the approach taken in *Williams* v. *McGowan*, *supra*, whereby the individual assets must be judged against the statutory standard (345 U.S. 544, 551-552). For the same reasons, taxpayers' argument (Br. 33) that the animals were replacements in their herd misses the mark.

These principles also dispose of the "liquidation" cases upon which taxpayers rely. In *Deseret Livestock Co.* v. *Commissioner*, decided March 25, 1953 (P-H Memo T.C., par. 53,093), capital gain was permitted on the sale of heifers not because extraordi-

nary drought conditions required a reduction of the herd, but because these animals were found to be held for breeding purposes prior to the sale. In *Bartlett* v. *Commissioner*, decided September 22, 1955 (P-H Memo T. C., par. 55,259), the heifers sold had earlier been selected for, and added to, the breeding herd. In *Harder* v. *United States*, (E. D. Wash.), decided February 17, 1959 (59-1 U.S.T.C., par. 9364), although the heifers were sold because of poor range conditions before they were actually bred, they had earlier been placed in separate pasture and given special feeding to facilitate conception. They were clearly held for breeding purposes before sale. The distinguishing factor in the present case is that the taxpayers' heifers were not introduced into the breeding herd—despite exposure to the bulls—until they reached the age of 24 months. Until that time, they were held primarily for sale as beef just as the steers were. This finding is based upon substantial evidence described above, and is not clearly erroneous. *United States* v. *O'Neill*, *supra*.

It remains only to comment briefly on two other arguments urged by the taxpayers. They rely upon an early ruling, I.T. 3712, 1945 Cum. Bull. 176, in which the Commissioner stated that if the number of animals sold from a breeding herd exceeded those raised and added to it, the excess would be presumed as held for breeding purposes. I.T. 3712 was issued before Section 117(j) was amended in 1951 to include livestock within the term "property used in the trade or business." After the decisions in *Albright* v. *United States* and *United States* v. *Bennett*, *supra*,

I.T. 3712 was revoked by Mim. 6660, 1952-2 Cum. Bull. 60. Mim. 6660 was itself revoked by Mim. 6776, 1952-1 Cum. Bull. 71, after the 1951 amendment to Section 117(j). More importantly, Mim. 6776 expressly stated that the revocation of Mim. 6660 should not be considered as reinstating I.T. 3712. Taxpayers' argument (Br. 36-37) that the Commissioner's position with respect to herd reductions—as set forth in I.T. 3712—somehow survived its revocation is beyond comprehension. The administrative interpretation embodied in I.T. 3712 simply lost significance in view of the later amendment to the statute itself in 1951.

Finally, the taxpayers point (Br. 38-39) to the recent enactment of Section 1245 in the Revenue Act of 1962, P. L. 87-834, 76 Stat. 960, Section 13, for support. That section is designed to treat as ordinary income the gain on the sale or other disposition of certain depreciable property therein defined. Livestock is expressly excluded. However, in the present case the taxpayers apparently carried their heifers in inventory on the "unit-livestock-price" method. (R. 5, 38.) Treasury Regulations 111 (1939 Code), Section 29.23(l)-10, provide that livestock shall not be depreciated if they are included in an inventory since the reduction in value will be reflected in that inventory. Section 1245 was designed to prevent the conversion of ordinary income into capital gain in situations where excessive depreciation deductions were taken prior to sale. Wholly aside from the exclusion of livestock from the property dealt with in that provision, there simply can be no such conversion

when, as here, the heifers were not even depreciable. Accordingly, the enactment of Section 1245 is without significance insofar as the instant case is concerned. The prime consideration here is still whether the livestock are held for breeding purposes or primarily for sale to customers in the ordinary course of business. The Tax Court has decided the latter with respect to the heifers involved in this review, and the taxpayers have not shown that finding to be clearly erroneous.

CONCLUSION

For the reasons stated, the decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

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DECEMBER, 1963.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: .....day of....., 1963.

ALEC A. PANDALEON,
Attorney.

APPENDIX

nternal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade, or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l);

* * * *

(j) [as added by Sec. 151(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inven-

tory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets.

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(26 U.S.C. 1952 ed., Sec. 117.)

Revenue Act of 1951, c. 521, 65 Stat. 452:

Sec. 324. SALES OF LIVESTOCK.

Section 117(j)(1) is hereby amended by adding at the end thereof the following new sentences: "Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry." The first sentence

added to section 117 (j) (1) by the amendment made by this section shall be applicable with respect to taxable years beginning after December 31, 1941, except that the extension of the holding period from 6 to 12 months shall be applicable only with respect to taxable years beginning after December 31, 1950. The second sentence added to section 117(j) by the amendment made by this section shall be applicable only with respect to taxable years beginning after December 31, 1950.

Treasury Regulations 111 (1939 Code):

Sec. 29.117-7 [as amended by T. D. 5970, 1953-1 Cum. Bull. 183]. *Gains and Losses from Involuntary Conversions and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

* * * *

(c) *Livestock held for draft, breeding, or dairy purposes.*—For the purpose of this section, the term "livestock" shall be given a broad, rather than a narrow, interpretation and includes cattle, hogs, horses, mules, donkeys, sheep, goats, fur-bearing animals, and other mammals. It does not include chickens, turkeys, pigeons, geese, other birds, fish, frogs, reptiles, etc.

The determination whether or not livestock is held by the taxpayer for a draft, breeding, or dairy purpose depends upon all of the facts and circumstances in each particular case. The purpose for which the animal is held is ordinarily shown by the taxpayer's actual use of the animal. However, a draft, breeding, or dairy purpose may be present in a case where the animal is disposed

of within a reasonable time after its intended use for such purpose is prevented by accident, disease, or other circumstance. An animal held for ultimate sale to customers in the ordinary course of the taxpayer's trade or business may, depending upon the circumstances, be considered held for a draft, breeding, or dairy purpose. An animal is not held by the taxpayer for a draft, breeding, or dairy purpose merely because it is suitable for such purpose or because it is held by the taxpayer for sale to other persons for use by them for such purpose. Furthermore, an animal held by the taxpayer for other purposes is not considered to be held for a draft, breeding, or dairy purpose merely because of a negligible use of the animal for such purpose or because of the use of the animal for such purpose as an ordinary or necessary incident to the purpose for which the animal is held.

These principles may be illustrated by the following examples:

Example 1. An animal intended by the taxpayer for use by him for breeding purposes is discovered to be sterile, and is disposed of within a reasonable time thereafter. This animal was held for breeding purposes.

Example 2. The taxpayer retires from the breeding or dairy business and sells his entire herd, including young animals which would have been used by him for breeding or dairy purposes if he had remained in business. These young animals were held for breeding or dairy purposes.

Example 3. A taxpayer in the business of raising hogs for slaughter customarily breeds

sows to obtain a single litter to be raised by him for sale, and sells these brood sows after obtaining the litter. Even though these brood sows are held for ultimate sale to customers in the ordinary course of the taxpayer's trade or business, they are considered to be held for breeding purposes.

Example 4. A taxpayer in the business of raising horses for sale to others for use by them as draft horses uses such horses for draft purposes on his own farm in order to train them. This use is an ordinary or necessary incident to the purpose of selling such animals, and, accordingly, these horses are not held for draft purposes.

Example 5. The taxpayer is in the business of raising registered cattle for sale to others for use by them as breeding cattle. It is the business practice for the cattle to be bred, prior to sale, in order to establish their fitness for sale as registered breeding cattle. In such case, those cattle used by the taxpayer to produce calves which calves are added to the taxpayer's herd (whether or not the breeding herd) are considered to be held for breeding purposes; the breeding of other cattle is an ordinary or necessary incident to the holding of such other cattle for the purpose of selling them as registered breeding cattle, and the breeding of such cattle does not demonstrate that the taxpayer is holding the cattle for breeding purposes.

Example 6. A taxpayer, engaged in the business of buying cattle and fattening them for slaughter, purchased cows with calf. The calves were born while the cows were held by the tax-

payer. These cows were not held for breeding purposes.

S. Rep. No. 781, 82d Cong., 1st Sess., pp. 41-42 (1951-2 Cum. Bull. 458, 487-488):

8. *Gains from sales of livestock*

Section 117(j) of the code provides, in effect, that a net gain from sales of "property used in the trade or business" of a taxpayer and held for more than 6 months is to be treated as capital gain. In the case of a loss, it is to be treated as an ordinary loss. However, section 117(j) states that this treatment is not to apply to "property of a kind which would be properly includible in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." In the case of farmers there has been considerable confusion and dispute for several years as to whether all livestock held for draft, dairy, or breeding purposes is "property used in the trade or business," or whether in some cases the livestock should be deemed held "primarily for sale to customers in the ordinary course of his trade or business."

Rulings of the Treasury Department issued in 1944 and 1945 held that the capital gains treatment was applicable only in the case of unusual sales such as those which would reduce the normal size of the herd or those resulting from a change of breed or other special circumstances, and that the capital gains treatment would not apply to the customary sale by a farmer of old or disabled animals culled from the breeding

herd and replaced by young animals produced by the breeding herd. Early in 1949 the United States Court of Appeals, Eighth Circuit, held in the *Albright* case (173 F. 2d 339) that animals used for breeding purposes, whether or not sold as culls in the ordinary course of business, constituted "property used in the trade or business" within the meaning of section 117(j). That decision specifically applied to dairy cattle and hogs but was applicable by implication to other types of livestock.

Notwithstanding the *Albright* decision, the Treasury Department continued to adhere to its position initiated in the 1944 and 1945 rulings, pending possible contrary decisions in other courts which might result in a conclusive decision by the Supreme Court. The Revenue Act of 1950 as passed by the Senate contained a provision intended to clarify this situation, but this was rejected in conference, principally because it referred to "cattle" and thus did not clear up the situation with respect to other forms of livestock such as sheep and hogs. However, the conference committee expressed the hope that the Treasury would follow the *Albright* decision.

In January 1951 the United States Court of Appeals, Fifth Circuit, decided the *Bennett* case (186 F. (2d) 407) in a manner similar to the *Albright* decision. Subsequently the Bureau of Internal Revenue issued a ruling, Mim. 6660, stating that the capital gains treatment provided by Section 117(j) would be applied to sales of culls. However, this ruling contained a statement that this treatment might not be applied in the case of animals "not used for substantially their

full period of usefulness." This exception appears to have resulted in new uncertainties, and it has been stated that Bureau agents are interpreting this ruling to mean that only animals which have completely outlived their usefulness can qualify for the capital gains treatment.

The House bill added a new sentence to section 117(j)(1) providing that the term "property used in the trade or business" includes "livestock held by the taxpayer for draft, breeding, or dairy purposes for 12 months or more." In view of the uncertainties resulting from the recent ruling (Mim. 6660), section 324 of your committee's bill restates the sentence contained in the House bill as follows:

> Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition.

Under your committee's bill, the term "livestock" does not include poultry except that it does include turkeys, regardless of age, held by the taxpayer for breeding purposes and held for 12 months or more from the date of acquisition. Thus section 117(j) will apply to livestock used for draft, breeding, or dairy purposes, and to turkeys used for breeding purposes, whether old or young; and the holding period will start with the date of acquisition, not with the date the animal or fowl is put to such use.

* * * *

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Nos. 17,838 and 17,839

UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

. VAUGHAN,
Petitioner,

vs.

MISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 17838

. VAUGHAN,
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vs.

MISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 17839

REPLY BRIEF OF PETITIONER

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MISCELLANEOUS

Nos. 17,838 and 17,839

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REPLY BRIEF OF PETITIONER

ARGUMENT

EFER CALVES DO NOT HAVE TO BE USED FOR BREEDING BEFORE THEY CAN E CONSIDERED MEMBERS OF A BREEDING HERD FOR THE PURPOSE OF DETER-IING A TAXPAYER'S RIGHT TO CAPITAL GAINS ON THE PROCEEDS FROM H SALE OF SUCH ANIMALS.

In the final analysis, the Tax Court's findings, and e pondent's arguments in support thereof, are based on the rmise that a heifer cannot become a member of the breeding herd il it has produced a calf. The court found this did not mally occur until the age of 24 months.

The law is clear that whether or not an animal is a member the breeding herd is a question of fact which can only be ablished by evidence of the intent of the owner. The theory t an animal cannot be considered as a member of the breeding d, and its sale result in long term capital gain, until it reproduced has been specifically rejected by Congress and courts. As was stated in McDonald v. Commissioner of Internal enue, (1954)(CA-2) 214 F.2d 341:

> "Prior to this 1951 amendment the Commissioner had first refused to recognize that livestock could qualify for treatment under the capital gains provision, and then had ruled that only unusual reductions of herd would suffice. A series of adverse rulings in the courts, Albright v. United States, 8 Cir., 173 F.2d 339; United States v. Bennett, 5 Cir., 186 F.2d 407; Miller v. United States, D. C. Neb., 98 F.Supp. 948, led him to modify his position so as to allow such treatment of animals sold after being employed for substantially their full period of usefulness. Treas. Dept. Bull. June 17, 1951, Mim. 6660, 1951-2 Cum. Bull. 60. But all of the foregoing cases had given the section a far more liberal interpretation than this, granting favored treatment to the proceeds from young animals, and

in two of the cases from heifers (females which had never dropped a calf).

"When Congress undertook to amend §117(j)(1), it was made fully cognizant of this situation by representatives of livestock and breeding associations. Hearings before Committee on Finance on H.R. 4473, Revenue Act of 1951, Part. 3, pp. 1538, 1837, 2396; Sen. Rep. No. 781, 82d Cong., 1st Sess. 41-42. And it is manifest that the section was drafted with an eye to the breeders' complaints. Thus in defining property 'used' in the business the amendment speaks of livestock 'held' for an appropriate purpose, and adds the further proviso that it apply 'regardless of age.' The intent to repudiate the Commissioner's view is obvious, even without the specific statements in the Report of the Senate Committee on Finance, supra. And it is equally clear that the animal need not be mature and need not have been put to its intended use."

Similarly, in Estate of C. A. Smith, 23 T.C. 690, 707, the Tx Court stated:

". . .It is obvious that a breeding herd must be constantly replenished with young animals to continue its vitality. In the period when the younger animals are developing, presumably their immaturity alone is not conclusively determinative of the purpose for which they are being held. That is the fault with the respondent's proposed test; it would make immaturity conclusive.

"The legislative history of the 1951 amendment plainly indicates that Congress was concerned over the Commissioner's reluctance to recognize that young animals were capable of being held as breeding stock.[6] And, the phrase 'regardless of age' written into the statute indicates a clear intent to prevent age alone from being used as the criterion. As the Fourth Circuit said, in commenting on the 1951 amendment in the course of affirming our decision in the Fox case, 'The important thing is not the age of the animals but the purpose for which they are held.' 198 F.2d at 722; cf. also McDonald v. Commissioner, (C.A. 2, 1954) 214 F.2d 341, reversing 17 T.C. 210 (1951)."

[6] S.Rept. No. 781, 82d Cong., 1st Sess., pp. 41-42

All testimony adduced at trial was to the effect that aughans and Milford intended that all heifers become members f the breeding herd at birth, in order to increase the herd to he capacity of the operation. The provisions of the agreement ith Milford were consistent with this intent, wherein they rovided an incentive to Milford to increase the breeding herd so hat he would receive one-half of the increase at the termin- ion of the contract. It is undisputed that Milford intended o increase the breeding herd to the maximum capacity of 2150 ount cattle, in order that he would have a herd of his own, rom the increase, with which to stock his ranch at the termin- ion of the contract.

Floyd testified as follows in answer to two questions:

> "Q. (By Mr. Bailey) In so far as maintaining this herd of cattle turned over to Mr. Vaught, what were the desires or purposes of the Vaughan Brothers partnership, what did you expect to accomplish so far as the size of the herd was concerned?
>
> A. We expected and hoped to and wanted to build that herd of cattle right back up to where they had been in the prior years, back in the year '45. We felt there was ample room to do so and it was our hope and desire that that would be done.
>
> Q. Now, when you say build it up to in 1945, you mean to a size of herd prior to the 1945 transaction to which you testified?
>
> A. That is correct." (R. 160)

The testimony of Floyd on cross-examination and testimony Milford and F. C. Vaughan to the same effect are contained in pendix A, infra.

The respondent attempted to justify the court's finding hat the heifers did not become members of the breeding herd ntil they reached the age of 24 months upon the basis that there as insufficient evidence to ascertain the reason for which such nimals were held. To the contrary, all of the evidence pro- uced at the trial was to the effect that the Vaughans and ilford intended that all heifers become members of the breed- ng herd at birth. An extract of the testimony of the Vaughans nd Milford on this point is set forth in Appendix A.

It is interesting to note that the respondent in his brief n attempting to find support in the record for the court's inding had to go beyond the evidentiary record into the court's indings as indicated by his statement on page 20 of his brief:

> "Milford testified (R. 344) that a heifer usually commences breeding at about 14 or 15 months. Since the gestation period lasts nine months (R. 438), most heifers did not produce a calf until they were approximately two years old. He also stated (R. 345-346) that a heifer can be considered a useful member of the herd at that age. In addition, the Tax Court found (R. 429) that 'The characteristics upon which a determination is made as to whether a heifer will be valuable as a replacement in the herd do not develop until the heifers are 18 to 24 months old.' F. C. Vaughan stated (R. 412) clearly that the culling of heifers was not satisfactory until they were 15 to 23 months old."

Respondent cites the record for most of his argument until h gets to the very meat of the nut where he suddenly switches, o page 20 of his brief, to the findings of the Tax Court for he following observation:

> "In addition, the Tax Court found (R. 439) that 'The characteristics upon which a determination is made as to whether a heifer

will be valuable as a replacement in the herd do not develop until the heifers are 18 to 24 months old.'"

The evidence of the Vaughans and Milford on the question f intent is undisputed in the record and provides no support or the court's findings.

The intention of Milford and Vaughan was to retain every eifer in order to increase the breeding herd. However, even nder these conditions it was necessary to cull out certain ndesirable heifers. The actual testimony of Floyd, Milford nd F. C. with respect to the culling and the selection of eifers for sale to provide Milford with operating expense oney does not contain one word nor convey one inference that eifers were not selected for the breeding herd until they were 4 months old.

With respect to selection of heifers for sale, Floyd estified:

"Q. Whenever heifers are sold out of the range herd, how is the selection made as to what heifers to sell?

A. The selection of heifers that are sold out of an outfit is based on two or three different things. A man would sell, if he had two heifers, one of equal quality, one he could definitely tell she was going to produce an offspring, he would be much more-or less apt to sell that animal than one he couldn't tell whether she was going to produce an offspring or not." (R. 144)

* * *

"Q. How was the selection made out of the heifers to be sold out of a range herd of cattle?

A. I believe I did finish it, Mr. Bailey. That would be one basis of selection,

whether the animal was going to produce an offspring or whether she wasn't going to produce an offspring. Probably the next basis of selection would be her quality, her confirmation, her color, her build, that would probably be the next consideration.

Q. Is that all?

A. I believe so."

Milford's testimony was substantially the same. He stated he herd involved were range cattle, run on an open range, as ifferentiated from a purebred herd, or one operated in a fenced rea. With respect to the selection of heifers for sale, the ertinent portions of Milford's and F. C. Vaughan's testimony re shown in Appendix B, infra.

It is true that there were certain sub-standard heifers hat would have been and were sold each year whether or not isibly pregnant. When it became apparent each year that heifers, ther than the aforementioned culls, would have to be sold, isibly pregnant heifers were retained because they were obviously oing to produce a calf and, secondly, because the cattle buyers idn't want to buy them. Finally, the remainder of the heifers old were the less desirable ones, even though many good heifers ere sold in order to provide funds so that Milford could pay f his bank financing.

The testimony shows that the best time to cull out the desirable heifers because of long necks, long faces, bad coloring or poor confirmation is between the ages of 15 to 24 months. oth Milford and F. C. Vaughan testified that the culls were liminated and sold at that age. However, those facts do not

support a finding that the heifers were not selected for the breeding herd until the age of 24 months. It is beyond cavil that Vaughan knew they would have to sell certain culls. However, the law is well settled that gain on the sale of culls, that were intended as members of the breeding herd until undesirable characteristics developed, results in capital gains. Similarly, those heifers sold out of the breeding herd because of unusual circumstances results in capital gains.

The evidence establishes that the steers were gathered for sale, and that certain cull heifers and cull cows were selected for sale, before any of the other animals were selected for that purpose. Through this culling process of heifers and cows, and the purchase and use of only registered thoroughbred Hereford bulls, the quality of the herd was constantly being improved. When additional heifers had to be sold, they had to be selected from the remainder of the herd. Since the herd was not a scrub herd, those sold were good animals. Good husbandry, and selectivity, were ever present in the minds of both Milford and Vaughans, when heifers or cows were selected for sale. This selectivity was practiced for the obvious reason that the cattle retained constituted the remaining breeding herd to be returned to Vaughans at the termination of the contract, or to be divided between Vaughans and Milford as excess animals.

The cattle on this operation were operated as one herd. Neither Vaughans, nor Milford, ever had occasion to segregate any animals from the breeding herd. This was not an operation where the cattle were registered thoroughbred Herreford, thus

naking it necessary to segregate the breeding herd from the sale herd, and to segregate the bulls in order that birth records required for registered cattle could be maintained. This operation was a beef factory. They operated a breeding herd of range cattle for the production of beef steers for sale in the long yearling class. The only way the breeding herd could be increased was by the retention of heifers and exposure of them to bulls for breeding to the greatest extent possible. This they did. The heifers were never segregated for sale as "open" heifers. There is no evidence that a large proportion of the long yearling heifers were annually offered for sale or sold because of lack of operating facilities to care for them. To the contrary, the evidence is conclusive that the ranch was never stocked to its capacity of 2150 head of count cattle from 1946 until April 1, 1951. There is no evidence that the heifers were raised primarily for sale in the ordinary course of business. They were never advertised for sale to the public. This was not a herd of registered cattle that produced maximum income through the sale of the heifers and/or cows to others for breeding purposes.

Normally heifers will start breeding at 12 months of age. None of the heifers or cows that were sold had sucking calves at time of sale, and each animal was selected for sale because it did not have a calf or was not perceptibly pregnant. The sale of these animals was required, from an operating viewpoint, when there was a requirement for additional funds to keep Milford in operation. Milford could ill afford to winter a non-producer.

Respondent's brief cites several cases in support of his

contention that the heifers sold by petitioners were animals held primarily for sale in the ordinary course of business. Petitioners do not disagree with the results in the cases cited, but respectfully submit that they are distinguishable, on the facts, from the present proceedings. The cases cited dealt with registered herds of livestock. The operation of a registered herd of livestock permits the retention as members of the breeding herd of only the very finest of the heifers produced. In Gtfredson v. Commissioner of Internal Revenue, 217 F.2d 673, the animals were advertised for sale as registered animals and it was the petitioners' intention to sell a substantial portion of the offspring. The offspring could not be admitted as members of the breeding herd until they had proved themselves, heifers at age of 36 months and bulls at 48 months. The animals in question there were in each instance younger than the minimum age requirements. The same is true in William Wallace Greer, Jr., 7 T.C. 965. Many of the chinchilla rabbits sold had not actually been selected for the breeding herd since they had not proved themselves as breeders under the standards set by the petitioner before admission to the breeding herd of outstanding registered animals.

Biltmore & Co. v. United States, 228 F.2d 9, involved the sale of surplus animals that were not needed for either the herd or the reserve and could not be retained because the operation was stocked to capacity. The animals sold had never become members of the breeding herd.

Fox v. Commissioner of Internal Revenue, 198 F.2d 719, in-

volved sales of thoroughbred, registered cattle. The court found there was no showing that any of the animals sold were part of the producing unit and that most were sold at an age before they could have become so. The court placed its finger squarely on the biggest difference between a registered herd operation and a range herd producing beef when it stated:

> "Like all other persons engaged in a similar business (registered cattle herd) petitioners are, no doubt, alert to maintain and to improve the high quality of their producing unit; and to this end it may be that at times they select from among the calves raised some animals which they consider of such high quality as to justify their being placed in the producing unit . . ."

The evidence shows that the Vaughan operation raised all of their own heifers and cows and only purchased registered bulls to upgrade the herd. They were producing beef, not registered stock for sale to other breeders.

In Cole v. United States, 138 F. Supp. 186, the surplus animals sold from a high grade registered herd of cattle were not capital assets because there was never any intent on the part of Cole to use them for breeding purposes.

Estate of C. A. Smith, 23 T. C. 690, contains a very illuminating discussion of the operation of a registered purebred herd. A comparison of the facts with those in Vaughan points up that the two operations are as different as black and white. Smith very clearly illustrates that only the very finest offspring of a purebred registered herd are retained for breeding purposes. Furthermore, if the animals were intended for the breeding herd, the fact that they are sold before being bred will not prevent

m from being classified as held for breeding purposes. As tofore noted, the court stated:

> ". . . It is obvious that a breeding herd must be constantly replenished with young animals to continue its vitality. In the period when the younger animals are developing, presumably their immaturity alone is not conclusively determinative of the purpose for which they are being held. That is the fault with the respondent's proposed test; it would make immaturity conclusive.
>
> "The legislative history of the 1951 amendment plainly indicates that Congress was concerned over the Commissioner's reluctance to recognize that young animals were capable of being held as breeding stock.[6] And, the phrase 'regardless of age' written into the statute indicates a clear intent to prevent age alone from being used as the criterion. As the Fourth Circuit said, in commenting on the 1951 amendment in the course of affirming our decision in the Fox case, 'The important thing is not the age of the animals but the purpose for which they are held.' 198 F.2d at 722; cf. also McDonald v. Commissioner, (C.A. 2, 1954) 214 F.2d 341, reversing 17 T.C. 210 (1951)."
>
> [6]S. Rept. No. 781, 82d Cong., 1st Sess., pp.41-42.

In John L. Clark,(1957), 27 T.C. 1006, sales from a herd of istered breeding cattle were involved. The cattle were exten- ely advertised for sale as breeders and prospective buyers could e their pick. The court quite properly held that the cattle d were held primarily for sale in the ordinary course of business the proceeds resulted in ordinary income.

These situations involving admission of outstanding heifers registered thoroughbred herds are a far cry from a typical ge herd operation that primarily produces steer beef for sale. an expanding range herd operation such as the one involved in s case, the heifers remain in the breeding herd unless culled

tan age when undesirable characteristics appear.

Petitioners rely on Albright v. United States., 173 F.2d 339; ited States v. Bennett, (CA-5) 186 F.2d 407; Fawn Lake Ranch Co., T.C. 1139; Miller et al v. United States, USDC Neb., 98 F.Supp. ; Pfister v. United States, USDC So. Dak., 102 F. Supp. 640, 'd on another point, CA-8, 205 F.2d 538; McDonald v. Commissioner Internal Revenue, 214 F.2d 341; O'Neill v. United States, USDC Dist. Calif., 52-2, USTC Para. 9462, aff'd CA-9, 211 F.2d 701; ate of C. A. Smith, 23 T.C. 690, acq. 1956-1 CB 5; Deseret Live ck Company, Para. 53, 093, (1953) P-H Memo T.C.; Bartlett, . 55,259 (1955) P-H Memo T.C.; Smith, Para. 56,030 (1956) P-H T.C.; Miller v. Connell, USDC West. Dist. Mo., 56-1 USTC, Para. ; Carter v. Commissioner of Internal Revenue, CA-5, 257 F.2d , reversing in part 16 T.C. Memo 280; and Harder, et al v. ed States, USDC East. Dist. Wash., 59-1 USTC Para. 9364. All hese cases have been cited and discussed in petitioners' open- brief. Petitioners again emphasize, however, their contention the facts in this proceeding fully establish petitioners' tlement to capital gains from the sale of the heifers in ques- n under the rationale of the above cited cases.

Even if we were to adopt the theory apparently relied upon he Tax Court that a heifer must be actually used as a member he breeding herd before it can be considered a part of said , the evidence would not support the court's finding that the al had to reach the age of 24 months. The evidence is clear the heifers begin breeding at about the age of 12 months and least 50% produce a calf by the age of 24 months. If the test

be applied is the actual use of the animals for breeding pur-
ses, it is obvious that the animals were in fact used as a part
the breeding herd at the time they were bred which of necessity
to be 9 months prior to the time they produced a calf, which
some reason seems to be the magic date relied upon by the
rt. Thus, the animals were used for breeding at 12 months.
shall Anderson, a cattle buyer who testified for petitioners,
ted that even though he tried to purchase non-pregnant heifers,
usually 40% to 50% of the heifers purchased from a range herd
pregnant. From this it would follow that in any event at
st 50% of the heifers sold by petitioners had actually been
d prior to sale. (R. 388-389)

Respondent insists that the test of whether or not an
mal is a member of the breeding herd turns on whether it is
productive member of the herd. On page 15 of his brief he con-
ds that the amendment to Section 117(j), Internal Revenue Code
1939, by Section 324 of the Revenue Act of 1951, C. 521, 65
t. 452, was to preserve capital gain treatment even though an
mal held for breeding purposes was sold before its breeding
fulness had ended. This misapprehension strikes at the very
rt of this controversy and at the risk of being repetitious
pectfully call attention to what was said in McDonald v.
missioner of Internal Revenue, (1954)(CA-2), 214 F.2d 341, and
the Estate of C. A. Smith, 23 T.C. 690, 707, as heretofore set
at the beginning of this brief.

These interpretations expressed by the courts indicate
gress was concerned about disallowance of capital gains on

ug animals in the breeding herds and not, in the words of the
spondent, animals sold before their usefulness had ended.

The actions and arguments of the respondent in this matter
fect his position of 20 years ago.

Respondent, on page 23 of his brief, states:

> "The fact, upon which the taxpayers so strenuously rely, that they were forced to sell these animals is of no material consequence. The immediate reason for sale is not the crucial factor; the essential question is the reason for which the animals were held prior to sale."

The only facts recited by the Tax Court in support of its
stion that the animals in question were held primarily for
l, which are actually supported by the record, are the sales
he animals. Obviously, if the sales had not been made, we
ud not be engaged in this controversy. Is bare evidence of
esales sufficient, standing alone, to justify the holding of
eTax Court? If it is, this taxpayer and others selling breeding
ok can never prevail. It is petitioners' position that since
eanimals in question were intended to be, and were treated as
mers of the breeding herd, that the reason for the sale must
xamined in order to determine if the act of sale is actually
rary to the expressed intent of the taxpayers that the animals
breeding stock.

Where the taxpayer was operating at capacity, obviously
lers other than replacements, sold each year, were not intended
reeding stock despite expressions of intent of the taxpayer
he contrary. Similarly, where taxpayers breed registered
oughbred stock for sale, sales from the breeding herd are

:t contrary to the expressed intent that the animals were
'eding stock. On the other hand the courts have held that
ıls of breeding heifers under certain conditions are not acts
)nrary to or inconsistent with the expressed intent that the
ıials were part of the breeding herd.

Even the Commissioner's Regulations 118, Section 39.117
])2), anticipate that even though animals are intended for
'eding, they may have to be sold where circumstances change
ıdsuch intended purpose is prevented by accident, disease, or
:hr circumstances.

In United States v. O'Neill, (1954)(CA-9) 211 F.2d 701;
ırer, et al v. United States, 59-1 USTC, Para. 9364, USDC East.
ıs. Wash; sales of unbred heifers because of adverse range or
:eing conditions were not sales inconsistent with intent that
ıe were breeding animals. To the same effect in Deseret Live
:ok Co., Para. 53,093, P-H Memo. T.C., and Carter v. Commissioner
? nternal Revenue, (CA-5) 257 F.2d 595, rev'd in part 16 T.C.
:m 280. The same decision was reached in Estate of C. A. Smith,
3 .C. 690, where taxpayer continued to show his breeding stock
:site the fact he had to sell them if requested. In Bartlett,
ır. 55,259, P-H Memo. T.C., the taxpayers sold immature heifers
:cuse of a shortage of funds and the court held that the sale
ıs not inconsistent with the intent that the animals were breed-
ıgstock. These cases were discussed in detail in our opening
rif on pages 11 through 22 and in the interest of brevity are
ıl summarized here.

In view of the facts established in this case, it is

ectfully submitted to this Court that the reason for the sale eifers is important, and that in view of the reason, that s had to be generated to permit Milford to perform under the ract, that the sales, standing alone, are not acts inconsistent the expressed intent that the heifers sold were members of breeding herd.

On page 26 of his brief respondent states he is unable to rehend taxpayers' argument regarding the applicability here ertain principles set forth in I.T. 3712, 1945 C.B. 176, since I.T. had been revoked. The taxpayers do not contend that I.T. has not been revoked. We do say that it was issued at a when the Commissioner would permit capital gains only on a ction of the breeding herd. With each successive ruling on subject the Commissioner was forced to accede to the various t decisions adverse to his stand and liberalize his views with ect to capital gains on breeding cattle.

Taxpayers point to the tests set forth in I.T. 3712 as being asonable approach by the respondent even at a time when his ished views as to capital gains were far more restrictive could be justified after amendment of Section 117(j), Internal nue Code of 1939, by Congress in 1951. Those tests in I.T. recognized some of the realities of a livestock operation. ly, that if animals are raised for sale as beef they are sold he fall when they are in their best condition and they are carried through the winter on feed. Winter feeding is the test expense of a range operation. Certainly the sale of ers in March or April, 1951 indicates that they were not

ntnded for beef in 1950 and were only sold under emergency
onitions and represent a partial liquidation of the breeding
er. Here again is a situation, the partial liquidation of a
reding herd, that the Commissioner of Internal Revenue early
ecgnized as producing capital gains even before the Congress
neded Section 117(j) of the Internal Revenue Code of 1939 in
)5.

It is petitioners' contention that the tests laid down in
T 3712 were reasonable then and the same tests are still
aonable in this situation where heifers from the breeding
r were sold in the spring of the year in partial liquidation
he breeding herd.

It is apparent from respondent's comment on page 26 of his
lf that he also does not comprehend the meaning of Section
in the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960,
ion 13. He states:

> "Section 1245 was designed to prevent the conversion of ordinary income into capital gain in situations where excessive depreciation deductions were taken prior to sale."

An analysis of Section 1245 reveals that the prevention is
nst all depreciation after the effective date and "excessive
eciation" is not mentioned in that section at all. Clearly,
Revenue Act of 1962 changes the tax treatment respecting gains
epreciable personal property (except livestock) by making any
s on the sale or other disposition of such property taxable
rdinary income to the extent of depreciation deductions
iously taken.

Under the Tax Court's decision in this case they have adoned their position in Estate of C. A. Smith, supra, where e state that a balanced breeding herd must contain heifers of lages for purposes of continuity. Here there are absolutely eifers under the age of 24 months considered by that court as mers of the breeding herd. In 1951 Vaughan sold every heifer e owned under the age of two years, but despite this none were eted as members of the breeding herd.

CONCLUSION

In view of the foregoing, it is respectfully requested that i Court find that petitioners are entitled to report as capital i under Section 117(j) of the Internal Revenue Code of 1939 egain realized from the sale of the heifers for the years 1948, 4, 1950 and 1951.

Respectfully submitted,

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FRANK E. MAGEE
JACK H. DUNN

Attorneys for Petitioner.

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Portland 5, Oregon

I certify that, in connection with the preparation of this lf, I have examined Rules 18 and 19 of the United States Court ppeals for the Ninth Circuit, and that in my opinion the going brief is in full compliance with those rules.

Frank E. Magee

Frank E. Magee, Attorney

APPENDIX "A"

:mony of Vaughans and Milford Vaught regarding intent

which heifers were held.

On cross-examination Floyd testified:

"Q. (By Mr. Picco) You wouldn't want to sell any if you had the opportunity, is that right? I thought you said at the beginning you were trying to keep all the heifers in there?

A. We were.

Q. At least you were trying to get up to a certain point with that herd, that is correct?

A. That is correct.

Q. But you found every year you were selling forty to fifty per cent of the heifer crop every year?

A. I wouldn't agree with that statement.

Q. I am trying to follow you, tell me what you were selling every year in the way of heifers?

A. We were selling whatever heifers were necessary to sell.

Q. You found that every year it was necessary to sell forty to fifty per cent of the heifer crop?

A. Again in the '48, the ninety-four heifers wouldn't be fifty per cent of the heifer crop.

Q. What per cent would it be?

A. Possibly thirty to thirty-three per cent.

Q. Mr. Vaughan, I can understand how you couldn't possibly predict that the sale of heifers would be necessary in 1947, the first time it happened, but when you tell this Court that that happened every year throughout the lease agreement, do you expect us to believe that, that you didn't know at the beginning of each year you would have to sell a certain number of the heifers?

A. I don't think that anyone knew that a heifer would have to be sold and it was surely our desire not to sell any."

(R. 240-41)

Milford testified on direct examination:

"Q. And at the time you entered into this agreement, Mr. Vaught, what was your idea about the size of the herd, what plan, if any, did you have in mind about the size of the herd during the course of this operation?

A. To build it just as big as I possibly could so at the termination of the lease I would have a herd of cattle of my own.

Q. Now, Mr. Vaught, was there any other source from which you could build up a herd of cattle other than the increase from the herd which the Vaughans turned over to you?

A. No. I might qualify that by saying that there would have been another source, I could have purchased cattle providing I put this iron on them, the Vaughan iron on them, to help build up the herd, but I didn't have the financing to do it with so for that reason there was no other one.

Q. What animals do you have to add into a herd of cattle in order to increase the size of it?

A. Normally to build up your mother herd it is the heifers that you add into your herd."

(R. 281)

"Q. When did you first realize or ascertain that those heifer sales would have to be made?

A. The final conclusion as to what heifers would have to be sold was after the cattle were rounded up and we determined what the income would be off of the steers and culled cows.

Q. That decision was made at what time?

A. During the fall of the year.

Q. Was this sale of heifers during the term of this contract in the fall of each year, was that in keeping with your policy of herd management to which you testified concerning building up the herd?

A. My intentions were to hold back every female I could in order to build it as long as I could during the life of the contract.

Q. Why didn't you do that?

A. Because my obligations had to be met and the only source of money to meet those was through the sale of heifers.

Q. And those circumstances were foreseeable in advance?

A. No."

(R. 292)

Redirect Examination:

"Q. Mr. Vaught, you have told us about the mounting expenses of raising this herd and how this affected this problem of what animals were to be sold each year to raise the money to finance it. Did the price of cattle from year to year during this period increase commensurate with the increase of operating cost?

A. No.

Q. And if it had been the same proportion increase of cattle prices, why, then would you have been able to operate on the sale of steers and cull cows if the price of cattle had gone up to the proportion to the increase of operation?

A. I think very closely to it, yes, very few heifers we would have needed to have sold.

Q. You testified on cross-examination, Mr. Vaught, in the normal cattle range operation that it is customary to regularly sell each year some of the heifer crop. Would you say this operation of yours under the Vaughan-Vaught agreement was a normal operation in that regard?

A. No, I would say that it isn't a normal operation.

Q. What regard--in what manner was it abnormal as compared to the manner a herd of range cattle is normally operated?

A. Our intention was to increase our herd and build it up to a larger herd where a normal operation, you would think of a normal operation as one being stocked to capacity or near capacity, and the normal operation would be the culling out of old cows and replacing them with heifers.

Q. Well, if you had had the opportunity to have carried out your basic purpose of increasing the herd, then, as compared to the total animals turned over to you at the beginning of the contract what percentage of increase would you have expected it to accomplish?

A. When I went into the contract I would increase it by a thousand head.

Q. As compared to the number of head turned over to you at the beginning, what percentage of increase would that have been?

A. Thinking right quick I would say 85 per cent increase.

Q. This mounting cost of operation, was that the basic reason why you were unable to accomplish this?

A. Yes.

Q. You testified on cross-examination that you knew you were going to sell heifers, I think. When did you know, for example, in the fall of 1947 when did you first know you were going to sell heifers?

A. After we had gathered the cattle and separated out the steers, determined about what their weight would be, their price, also the cows, that was the determining factor of the heifers to be sold and the number to be sold.

Q. Did you know in advance of the sale in the fall of each of these years you were going to sell heifers?

A. You would know as the season advanced in the late summer, it would be logical you would sell some of the heifers.

Q. Would you know in the preceding year?

A. No.

Q. So were these sales of heifers planned in advance, that is, a year in advance or two years in advance?

A. No.

Q. As far as these heifers were concerned, when they were dropped what was your basic intention with respect to the future use of the animals in the herd?

A. To use them as breeding cattle and leave them in the herd for replacement cattle.

Q. Explain why that was your basic intention with respect to the female calves from the date of their birth, why was that your intention?

A. That was the only opportunity I had to build the herd was through the retention of the female cattle."

(R. 367-370)

Milford testified on cross-examination:

"Q. You knew that you would only have one-half of the proceeds from the sale of the steers to operate on, is that correct?

A. That is right. I knew that all of the proceeds for the steers I would have would be one-half, yes.

Q. Was it not contemplated even as far back as the beginning of the period under the lease when you took over the operation that some of the heifers would have to be sold every year?

A. I think I made this statement before, had I been able to operate as economically as Vaughan or as they told me they operated, and I have no reason to doubt the figures they gave me, had I been able to operate that economically with the size of herd of cattle that we had, we could have operated on one-half of the sale of the steers plus one-half of the sale of culled cows and retained all of the heifers."

(R. 361-362)

F. C. Vaughan testified with respect to the intent of the tership:

"Q. At the time that Milford Vaught bought the T. Ranch and the related real estate, did you try to sell the cattle on that ranch to Milford Vaught?

A. We offered them to him.

Q. Did he buy them?

A. No, sir.

Q. Why not?

A. He thought they were too high and he wasn't financially able to take them on.

Q. Did he indicate to you at the time of the cattle agreement how he was going to operate the ranch?

A. He indicated he was going to follow our pattern.

Q. What pattern was that?

A. They (sic) way we operate on the same selling basis, selling yearlings, and his intention was to build up that herd.

Q. Do you know how Milford Vaught intended to stock that ranch?

A. By raising the cattle off from the cattle of ours.

Q. What was your intention with respect to the operation?

A. We hoped he would do it.

Q. Do what?

A. Increase the herd."

(R. 410-412)

APPENDIX "B"

timony of Vaughans and Milford Vaught with respect to selection heifers for sale. Milford Vaught testified on direct examination:

"Q. Will you explain the circumstances which controlled the decision concerning the number of cows and heifers to be sold each fall?

A. I had certain obligations to meet, my only source of income was through the sale of cattle. I was operating on borrowed money and over the year I had borrowed so much money from the bank which had to be paid back and I had to sell enough cattle to meet those obligations. After the cattle were rounded up and the steers were classified, you had an idea about what the market was going to be and you had an idea about what the steers were going to weigh, you had so much income from that source and, in addition, you had so many culled cows to take up and when they were taken out and, you made the same determination as to about how many dollars they would bring, that was your next source of income. Then you had to either go to cutting into the cows or into the heifers for any additional income you felt you had to have to continue your operation.

Q. Mr. Vaught, were these circumstances which controlled the decision concerning the sale of cows and heifers each fall, were those factors or circumstances foreseeable?

A. No, not to a full degree. I might explain a little what I mean by that. When I went into the operation the Vaughans informed me they were operating for about a

thousand dollars a month, which would be twelve or maybe fourteen thousand dollars a year that it was costing them. When I got into the operation I found that I couldn't operate that economically for several reasons, one very important reason was there were two Vaughan brothers, one could be out with the cattle, the other could be with the ranch, he could supervise the ranching end of it and so on, the other one could be out supervising the cattle. With just myself then I found it was necessary to employ a good man, a reliable man to put out with the cattle which, of course, cost me additional money. My method of operating was considerably different than the Vaughans in some respects. The Vaughans operated, you might say, in my opinion, on a slipshod basis. If a piece of fence fell over they propped it up and that was good enough for now. If a head gate washed out, why, they drove some boards into the creek and that was good enough for now. I had never operated on that basis and to me that was home. As far as I knew from there on that was going to be home, so when I tried to fix up anything I tried to fix it up on a permanent basis and when I went out and fixed up a piece of fence I put in new posts and those things all cost me additional money to what it had cost the Vaughans."

(R. 289-91)

* * *

"Q. Now, what percentage again by years of these heifers that were sold each fall were with calf at the time they were sold?

A. I wouldn't know.

Q. Well, would you say that any of them were?

A. Yes.

Q. What percentage would you say were?

A. The only way that I could make any estimate of that would be part of the heifers that we retained for replacement heifers that weren't sold we figured in the neighborhood of a forty to fifty per cent calf crop from those two-year old heifers, that would be the only way that I could determine. Now, then, if at the time that we are classifying the cattle and selling them, if we could determine that one might be with calf, we don't sell that one, we hold it back for replacement heifer unless it was something of inferior quality we would want to let go."

(R. 308-9)

* * *

"Q. Yes. Will you explain, Mr. Vaught, how the gathering of the cattle process occurred?

A. When we were ready to start the roundup, the fall round-up--let me go back a little bit. We had what we called the calf roundup, after we turned the cattle out in the middle of March, and so on, then in June we rounded up the cattle and branded all of the calves that we could find. We speak of it as the calf roundup. Then in the fall after we had got the hay put up, and so on, and were ready to gather the cattle to sell what we intended to sell, we spoke of that as the beef roundup. When we got ready to stage the beef roundup we always advised the Vaughans we were ready for the beef roundup and one or both of them came over and assisted with the roundup, and the way we make these roundups, you ride a certain area and gather the cattle and take out the cattle that you want to take into the field. Now, you take in more cattle than what you are going to sell to get them classified into groups where you can cut out the ones that you don't want to sell and the ones that you do want to sell. Now, we wouldn't take every dry cow that was out there. Here is a good cow, she shows she is good age and maybe going to have a calf, and so on, but we gather far more cows than what we intended to sell. We would gather practically all of the heifers and we would gather all of the steers. We would gather all of the cows we could find with unbranded calves and in the Battle Creek operation we had 4,000 acres under fence, we would take those in the field, brand the calves, turn those back out and segregate the cows by placing the cows in one field, the steers in one field, and that would give us our determination about what the steers were going to weigh and how many we had gathered, and so on. Then we would work the cows and cut out the ones that we didn't want to sell and the ones we did want to sell, the ones that we wanted to sell we would keep in the field, the others would be turned back outside again. Then we would cut back the heifers, cut back the better heifers, the outstanding heifers we wanted to keep for replacement heifers and boil them down to what we figured we would have to sell to bring in the amount of money that was necessary for our operation."

(R. 325-6)

* * *

Cross-Examination of Milford Vaught:

"Q. You mentioned you had an operation on Lost River before you came up here into the Bruneau Valley?

Q. In your operations on the Lost River did you sell some of the heifers each year or did you keep them all?

A. No, we sold heifers, too.

Q. Is that customary to do that in the livestock operations of the type under the lease agreement you had?

A. It is customary to sell a certain amount of heifers.

Q. Could you tell us what would be a reasonable estimate of the percent you would normally sell?

A. Let me try to explain it this way.

Q. Take your time.

A. A normal operation where a person is stocked to capacity, each year you have a certain amount of old cows or cows that become defective for some reason or another that you cull out of the herd and you save replacement heifers to take care of them and I think in a normal operation where a man is stocked to capacity that probably it is in the neighborhood of ten to fifteen per cent of the heifers. It depends on his death loss and so on. If he has a heavy death loss it might be necessary to hold back 20 per cent of the heifers, but with an operation where you are trying to build up your herd and increase your herd and so on, then your desire is to hold all of the heifers that you possibly can so they will become mother cows and start producing for you.

Q. In the operation under the lease agreement, you would discover that you would have to sell heifers in any event, is that correct?

A. That I had to sell heifers what?

Q. In any event sell heifers each year.

A. Yes.

Q. Did Floyd Vaughan or F. C. Vaughan ever tell you they had operated on the sale of steers alone in the operation they had before you came into the picture?

A. I don't know as if they ever made that remark. They did give me an estimate of their operating cost.

Q. Now, you knew you were going to receive but half of the proceeds from the sale of the steers?

A. That is right.

Q. From this operation. From your experience would that lead you to believe that the proceeds from the steer sales alone would not cover the expenses of the operation?

A. If I had been able to hold my operating costs as low as Vaughans held theirs or the figure they gave me, and I have no reason to doubt they were giving me a correct figure, if I would have been able to hold my operating costs that low I could have operated on the sale of one-half of the steers and one-half of the culled cows.

Q. How long did it take until it became apparent that you could not operate that way?

A. I realized in the first fall we were going to have to sell some heifers or some cows in order to come out."

(R. 334-5)

* * *

"Q. In selecting the heifers for sale you have mentioned that you did have a certain method or certain process. You are trying to select the inferior ones, is that it?

A. Yes, the better heifers are the ones you like to save for replacement.

Q. As far as the inferior ones, you would have sold them anyway, would you not?

A. Not necessarily. I am still in the process of building up a herd now and from our fall calf crop, last fall, that were baby beef last fall, I sold the steer end out of them, I kept all the heifers, didn't sell any of them. Now, as time goes on we may take the inferior heifers and sell them but we kept the entire group, but in the process of replacement of cattle you pick the better heifers for replacement. I think a successful operator always does that.

Q. During the years in question the lack of operating funds on your part necessitated the sale of even good heifers?

A. There were good heifers sold, yes, good cows sold.

Q. By allowing heifers to run with the herd and be exposed to the bulls, generally, which was done on this operation, in your experience did this qualify for admission as a member of the breeder herd?

A. I think it qualifies them as a member of the breeding herd. There are operators that are situated so they

can have fenced fields so they can take those heifers out and keep them separate, particularly the ones that they intend to sell. We weren't so situated so they became part of the breeding herd and we furnished bulls for them.

Q. But until the heifers started producing calves, you couldn't really determine she was a member of the herd, could you?

A. You mean of the breeding herd? She has been in with the breeding herd and been exposed to the bulls.

Q. That is about as far as you can say about these heifers until they reach a certain age and what age would you say, about two years old?

A. Well, you can go to determining on the heifer whether she is pregant before time for her to calve, quite a ways, much farther in advance than you could with an older cow, but in making our selections in the fall of the year, if anything showed that they were calfy, of course, they went into the breeding herd. They might not have been as good quality as some heifers we sold, the price is not as good on one, the feeder doesn't want to put her in the feed yards. Anything that did show they were calfy were held in the breeding herd."

(R. 356-8)

* * *

Redirect Examination of Milford Vaught:

"Q. You testified on cross-examination, Mr. Vaught, in the normal cattle range operation that it is customary to regularly sell each year some of the heifer crop. Would you say this operation of yours under the Vaughan-Vaught agreement was a normal operation in that regard?

A. No, I would say that it isn't a normal operation.

Q. What regard--in what manner was it abnormal as compared to the manner a herd of range cattle is normally operated?

A. Our intention was to increase our herd and build it up to a larger herd where a normal operation, you would think of a normal operation as one being stocked to capacity or near capacity, and the normal operation would be the culling out of old cows and replacing them with heifers.

Q. Well, if you had had the opportunity to have carried out your basic purpose of increasing the herd, then, as

compared to the total animals turned over to you at the beginning of the contract what percentage of increase would you have expected it to accomplish?

A. When I went into the contract I would increase it by a thousand head.

Q. As compared to the number of head turned over to you at the beginning, what percentage of increase would that have been?

A. Thinking right quick I would say 85 per cent increase.

Q. This mounting cost of operation, was that the basic reason why you were unable to accomplish this?

A. Yes.

Q. You testified on cross-examination that you knew you were going to sell heifers, I think. When did you know, for example, in the fall of 1947 when did you first know you were going to sell heifers?

A. After we had gathered the cattle and separated out the steers, determined about what their weight would be, their price, also the cows, that was the determining factor of the heifers to be sold and the number to be sold.

Q. Did you know in advance of the sale in the fall of each of these years you were going to sell heifers?

A. You would know as the season advanced in the late summer, it would be logical you would sell some of the heifers.

Q. Would you know in the preceding year?

A. No.

Q. So were these sales of heifers planned in advance, that is, a year in advance or two years in advance?

A. No.

Q. As far as these heifers were concerned, when they were dropped what was your basic intention with respect to the future use of the animals in the herd?

A. To use them as breeding cattle and leave them in the herd for replacement cattle.

Q. Explain why that was your basic intention with respect to the female calves from the date of their birth, why was that your intention?

A. That was the only opportunity I had to build the herd was through the retention of the female cattle."

(R. 368-70)

* * *

Recross-Examination of Milford Vaught:

"Q. You were referring to the herd in some of your testimony. You mean the breeding herd when you were referring to the herd?

A. Referring to the entire herd?

Q. Yes. So when you were talking of heifers being part of the herd you don't necessarily consider them as being part of the breeding herd?

A. I considered them as being part of the breeding herd.

Q. You mentioned that steers were part of the herd. You didn't consider them to be part of the breeding herd?

A. No."

(R. 376-77)

. . Vaughan testified that he helped gather the cattle for sale
ac and every year of the contract (R. 350). With respect to the
etod of selection for sale or otherwise he testified:

F. C. Vaughan Direct Examination:

"Q. Even though you intended to keep every animal that was fit for breeding, would it be necessary to sell off any cows?

A. Yes, there is always cows that are what we call breaking down, that is, getting old, and also spoiled bag cows and short milking cows and short breeding cows, that won't have a calf more than once in two years, you cull that stuff out of your herd annually if you have something to take its place. If a man hasn't he has to go out and buy some to take its place.

Q. How can you identify a cow that has no calf for two years?

A. A man knows his cattle; a cowman knows his cows just about as well as the city man knows his children. He knows each cow, in a sense, he don't know her name particularly, but he knows her and he observes if that

cow hasn't calved for maybe a year and isn't carrying on and he says, we will sell that cow this fall.

Q. What do you mean by calfy?

A. What do I mean by what?

Q. Calfy.

A. When she is showing calf.

Q. Even though you intended to keep every animal fit for breeding, would good husbandry require the sale of any heifers?

A. There would always be some culling in the heifers.

Q. For what reasons?

A. You got the long faced one, long necked one and off colored ones you don't want in your herd.

Q. At what ages do these--

A. (Interrupting) You can't do much of a job culling heifers until they are up in the yearling class.

Q. What age would that be?

A. Oh, fifteen to twenty-three months old."

(R. 411-12)

* * *

"Q. How would you determine how many heifers were to be sold?

A. I will tell you the way that was determined. Milford Vaught knew in a general way about how many steers he had and we would ride the range until he got those steers as close as he thought he could get them and he usually would have them within a five to ten per cent and in gathering the steers we would gather these cows as we came to them, an old cow and this kind of a cow. When we wanted them we would take them into the Battle Creek fields with the steers and we would gather some heifers along as we went through the gathering process, cut out the steers and cut out the cows and Milford would figure how much I am going to get and he would say, I got to have more money, so the next class of cattle he would have to go into would be the heifers, he would work up a set of heifers.

Q. On what basis would you cull the heifers?

A. On what basis cull the heifers?

Q. What basis did you select the heifers on to be sold?

A. We would select the heifers, the most undesirable ones to sell and we would keep the better ones. Now, I went over those figures here on this operation. During the four years under contest here, Milford's records show he sold 434 cows and lost and butchered 181. That makes a total of 613 head of cattle that he had to hold for replacement to keep the base herd and his numbers, it took 615 of these heifers during that span of years to replace the sold and lost. Now, if he had increased this herd a hundred head per year, he would have to have another head of heifers, if he increased this he would have to retain another hundred head of these sold heifers and then he would only have a five hundred increase at the end of these five years and that is the lowest number he ever anticipated having. Now, in this length of time there were 1,301 steers sold, so if you take the number of heifers sold and number of heifers it took for replacement, you see what he would have had to done, he would have had to kept them all but the culls."

(R. 415-16)

* * *

"Q. During that period of time what percentage of the heifers had calved at the age of twenty-four to twenty-six months?

A. What per cent of the heifers would calve and did calve annually? Oh, I think maybe we got fifty or sixty per cent crop on the yearling heifers coming two year olds.

Q. Based on that experience would it be a fair statement at least 60 per cent of the long yearlings sold, that they were pregnant?

A. Only in this respect, in cutting these heifers, the people that was buying them didn't want the calviest heifers and we didn't want to sell them, so the calviest heifers were retained and we wanted to make the buyer believe all the rest were of calf, but it proved that they were."

(R. 425)

The testimony of the Vaughans and Milford was corroborated by Marshall Anderson, a fully qualified cattle expert. He stated

part:

"Q. You stated that most range operations ordinarily sold heifers in the ordinary course of their business. Now, where a range operation is operating less than the capacity of the ranch is that an economical operation?

A. To operate less than capacity?

Q. Less than capacity.

A. No.

Q. If they were operating at less than capacity and were building the herd would they still have certain heifers to sell?

A. They might have a few.

Q. What type heifers would they be?

A. Oh, they would be the heifers that would lack confirmation and probably drafting, hairless, there might be a small per cent, two or three.

Q. So there would always be culled heifers to sell from any range operation?

A. There would be."

(R. 399-400)

* * *

"Q. Now, in your experience as a cattle buyer of heifers, what percentage of heifers that you have purchased out of these range herds have you found to be pregnant either upon slaughter of those animals or upon placing those animals in a feed lot?

A. Usually 40 to 50 per cent.

Q. Did I understand you to say you had helped cull or rather helped cut out heifers at the Vaughan-Vaught operation?

A. Yes.

Q. When they were cutting out those animals from the main herd, on what basis would the heifers be selected to be sold?

A. Well, I wouldn't take the real calfy heifer. First, we would leave them on the Vaughan rack and then--I don't

know why they agreed to sell the heifers--I tried to take the straight barrel heifers, what we called straight barrels. I don't know why they sold them. I selected them because they were fleshy and everything. Those with more flesh were more desirable.

Q. You did not want the so-called calfy heifers?

A. That is right."

(R. 388-89)

Nos. 17,838 and 17,839

UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

W. VAUGHAN,
Petitioner,

vs.

MISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 17838

W. VAUGHAN,
Petitioner,

vs.

MISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 17839

BRIEF OF PETITIONER P. W. VAUGHAN

PETITION TO REVIEW A DECISION OF
THE TAX COURT OF THE UNITED STATES

NKE. MAGEE
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MISCELLANEOUS

Nos. 17,838 and 17,839

UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

. VAUGHAN, Petitioner, vs. MISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 17838
. VAUGHAN, Petitioner, vs. MISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 17839

BRIEF OF PETITIONER P. W. VAUGHAN

JURISDICTIONAL STATEMENT

This is an appeal from the decision of the Tax Court of the ed States entered on October 5, 1961 determining deficiencies overpayments in Federal income taxes as follows:

	Deficiency	
Overassessment	Income Tax	Addition to Tax §293(a), 1939 Code
($678.36)	$ 12.39	$ 0.62
($ 89.84)	771.73	38.59

from a decision entered on October 4, 1961 determining

iencies as follows:

Deficiency			
	Additions to the Tax		
Income Tax	§293(a), 1939 Code	§294(d)(1)(A), 1939 Code	§294(d)(2), 1939 Code
$5,677.08	$283.85	$904.97	None
118.95	6.46	82.69	None
144.00	7.20	--	$8.64

The years in controversy on this appeal are 1948, 1949, and 1951 (R. 466, 475).

On December 29, 1954 respondent issued a statutory notice eficiency of personal income tax liability to P. W. Vaughan eafter referred to as P. W.) for the years 1947, 1948, 1949 1950 (R. 9). A petition was filed with the Tax Court of the ed States by petitioner on March 28, 1955, Docket No. 57164 4). On June 19, 1957 respondent issued a statutory notice of iency of personal income tax liability to petitioner for the s 1951, 1952 and 1953 (R. 43). A petition was filed with the Court of the United States by petitioner on September 16, , Docket No. 69942 (R. 36). Jurisdiction is conferred on the Court by Sections 7442, 6213 and 6214 of the Internal Revenue of 1954.

The Findings of Fact and Opinion of the Tax Court in tioners' cases and the following related cases that were con- lated for trial in the Tax Court, and which have been consoli- l in this Court for purposes of this appeal (R. 2), was filed ay 24, 1961 (R. 430).

. VAUGHAN and MATTIE VAUGHAN, Petitioners,
v.
ISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 17,823

OD C. VAUGHAN, Petitioner, v. MISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 17,836
OD C. and KATHERINE D. VAUGHAN, Petitioners, v. MISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 17,837
. VAUGHAN & MATTIE E. VAUGHAN, Petitioners, v. MISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 17,840
OD C.and KATHRYN L. VAUGHAN, Petitioners, v. MISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 17,841

This Court approved the joint motion of the parties that lof the cases be considered on the record of the cases of this ttioner (R. 3).

The decisions of the Tax Court for the years 1947 through , and 1951 through 1953, were entered on October 5, 1961 and tber 4, 1961, respectively (R. 466, 475). Petitions for review aid decisions by this Court were filed December 29, 1961 .482, 502). Jurisdiction is conferred on this Court by Sections and 7483, Internal Revenue Code of 1954.

STATEMENT OF THE CASE

Petitioner was a partner in Vaughan Brothers, a partnership, eafter referred to as Vaughan) for the years 1948, 1949, 1950 1951. He owned a 25% interest therein and the other partners his father F. C. Vaughan (hereafter referred to as F. C.) a 25% interest, and his brother Floyd Vaughan (hereafter

fered to as Floyd) who had a 50% interest (R. 126). Commencing
940 Vaughan purchased a ranch at Bruneau, Idaho and moved a
rd of approximately 1,000 female Hereford range cattle from
en to the ranch (R. 127, 128, 266). From the spring of 1940
t. 1945 the partnership almost doubled the number of female
tle on the operation (R. 266).

The headquarters ranch was at Bruneau and contained roughly
00 acres. The summer headquarters ranch owned by the partner-
ip was at Battle Creek, about fifty miles south of Bruneau, and
ntained about 3,600 acres. In addition to the deeded land owned
Vaughan at Bruneau and Battle Creek, they held grazing rights
on the state and federal governments on about 250,000 acres of
nd. The land started at Bruneau and continued south nearly to
e Nevada border and spread out over 25-50 miles east and west at
e southern most portion. The country was rough and inaccessible.
e ranch was classified as a desert open range operation as
fferentiated from an irrigated pasture or fenced range opera-
on. The ranch and leased range capacity during the years under
view was 2100 count cattle. Count cattle include all cattle
ot those less than six months old at the time they are turned
on the range in the spring (R. 129-138).

In 1945 Vaughan had 2100 count cattle on hand. In May,
4 Vaughan contracted to sell the ranch, all range rights, and
e cattle. The vendees took over operation of the ranch, sold
m 850 to 900 head of weaners and mature female animals (R. 138),
t because of difficulties in securing financing, rescinded the
rchase, with the partnership's consent, and returned the ranch,

e rights, and remaining portion of the herd to the partner-
in October, 1945 (R. 433).

On or about April 1, 1946 Vaughan sold the ranch, range-
, and range rights to Milford J. Vaught (hereinafter referred
s Milford)(R. 139). Milford was unable and unwilling to meet
han's price for the cattle (R. 139, 140, 410). On or about
15, 1946 Milford and Vaughan entered into an agreement for
operation of the cattle herd owned by Vaughan on Milford's
. The agreement was denominated a "lease" agreement and pro-
d that Milford was to furnish the feed, salt, management,
r, and pay all expenses, other than certain range fees and
s, necessary for the operation of the cattle herd as a unit.
xchange for the material and services provided by Milford he
to receive one-half of the sales proceeds from the sale of
cattle sold during the five-year period of the agreement and
half of the surplus of the cattle, after replacement of the
in like kind and numbers as received by him in April, 1946.
agreement provided that Vaughan was the owner of all of the
le and any increase during the term of the agreement (R. 78-
inclusive, 140, 337, 338). The cattle delivered to Milford
r the contract were:

790	range cows
306	heifers coming 2 years old
102	weaner calves
128	heifers
156	sucking calves
38	range bulls
1,520	total (R. 89)

he 1,520 cattle delivered to Milford all were count cattle
pt the 156 sucking calves, making a total of count cattle of

,34 or roughly two-thirds of the ranch capacity. The agreement
ısfor a period of five years terminating in 1951. All of the
ıtle and all of the increase were, under the terms of the con-
'at, owned by Vaughan and branded with Vaughan's brand (R. 78-88,
)3 284 285).

The operation of the ranch and cattle herd under Milford
ırng the years in question was in substantially the same manner
perated by Vaughan in prior years (R. 277). All of the cattle
ıd be turned out on the range about March 15, except the bulls
ıd "calvy" cows and heifers. After the calves were born the calf
ıd its mother were turned out. On May 1 of each year the herd
ıls were turned out. The gestation period of a calf is nine
ıths. The herd bulls were isolated during March and April to
'ent calf births in the bad months of December and January.
ıs of the calves were born in February and March, and a smaller
ıber of calves arrived in the fall. All of the cows, heifers,
ıers and calves were run with the bulls as one breeding herd
ıd in the production of beef (R. 277, 320, 321, 436, 437).

The principal commodity raised for sale were steers. Good
ıal husbandry also required that certain cows and heifers be
ıled out of the herd for various reasons and sold. The calf
ıdup occurred in June when the calves were branded and other-
ıe attended to as required (R. 341, 342). In late August or
ember the beef roundup was accomplished. At this time all of
ı steers to be sold were gathered as were the cows and heifers
)e culled from the herd and sold (R. 325, 326, 327).

In addition to the steers and culled cows and heifers sold

948, 1949 and 1950, Milford sold other heifers from the herd urnish sufficient funds for him to continue his operations r the contract (R.289, 290, 292). The number, weight and age he heifers sold were as follows:

Date Month	Number Sold	Average Weight	Age (In Months) Over	Not Over
Sept.	133	757	24	28
Aug.	135	842	24	36
Aug.	1	*	*	*
Sept.	94	692	18	24
Sept.	1	450	12	15
*	1	*	*	*
*	206	612	15	18
Dec.	1	375	10	12
*	89	562	14	18
*	99	703	18	24
*	53	453	12	15
Sept.	1	645	18	22
Sept.	1	620	17	20
Sept.	2	740	24	28
Total	817			

* Not shown by record (R. 442)

Milford faithfully performed under the contract and ived as his compensation one-half of the proceeds of all nals sold during the term of the contract. The selection of animals to be sold each year was made by Milford and F. C. or Floyd (R. 159).

The contract expired by its terms on April 1, 1951 (R.82). several years prior to that time Vaughan searched unsuccessly for adequate ranch facilities that could be purchased for operation of the cattle herd. As a consequence Vaughan empted to arrange with Milford to continue caring for part of

herd but they were unable to reach any agreement (R. 443). han, lacking adequate ranch facilities, was therefore required ell a substantial part of the breeding herd at the time the was returned in 1951.

The accounting under the contract was commenced in January, when the cattle were separated and Vaughan removed part of to Oregon at that time. Some of the cattle were sold to ord in January (R. 311-319, inclusive). The final accounting sales to Milford were accomplished in March of 1951. Part he breeding herd that Vaughan took to Oregon was sold in 1951.

The sales to Milford were as follows:

Cattle [a]	Age From	Age To	Total Price [b]
cows	6 yrs.	10 yrs.	$ 50,000.00
steers	(c)	(c)	2,400.00
suckers [d]	1 day	14 mos.	1,150.00
weaners (mixed) [e]	12 mos.	18 mos.	51,000.00
bulls	2 yrs.	8 yrs.	6,600.00
cows	4 yrs.	8 yrs.	41,250.00
heifers	20 mos.	24 mos.	11,250.00
Total			$163,650.00

a/ Disposition of 7 cows, apparently to Milford, and the price paid, if any, is not shown of record.

b/ Includes an unspecified amount paid for the dash running "M" brand.

c/ Not shown of record.

d/ Presumably suckling calves.

e/ Comprised of 170 steers and 170 heifers.

(R. 444)

Vaughan also sold 60 heifers that were over 12 months of to Robert Vaughan in November, 1951 (R. 445). Complete idation of the breeding herd and dissolution of the partner-

ni was accomplished by December 31, 1952 (R. 252).

The Commissioner of Internal Revenue refused to allow auhan any capital gain on the sale of cows, bulls or heifers irng the years 1947 through 1950 on the grounds that the itle sold were not held by Vaughan for breeding purposes irng those years. The Commissioner of Internal Revenue con-ened that the proceeds received by Vaughan under the contract isrental income! The Tax Court determined that Vaughan was ittled to treat the payments to Milford as compensation for rorming his contractual obligation of running and managing iecattle herd. Further, the Tax Court held that Vaughan was ittled to capital gains from the sale of bulls, cows, and iers over 24 months of age. Under this decision capital gains etment was allowed on the sale of cows and bulls for all years, idsale of heifers over 24 months of age.

Similarly, in 1951 when Vaughan was forced to liquidate iegreatest part of their breeding herd the Tax Court determined ia Vaughan was not entitled to capital gains on any heifers s than 24 months of age.

The question presented on this appeal is whether the iers, including those less than 24 months of age, sold in 4, 1949, 1950 and 1951, were members of the breeding herd and sited in capital gain to Vaughan when sold.

SPECIFICATIONS OF ERROR

1. The Tax Court erred in its determination that the iers under 24 months of age sold by Vaughan in 1948, 1949, 5 and 1951 were held by Vaughan primarily for sale to customers

n ne ordinary course of business rather than for breeding
ur oses.

2. The Tax Court erred in its determination that Vaughan
as not entitled to report as long term capital gain the gain
ro the sale of at least one-half of all of the heifers under
4 onths of age sold in 1948, 1949 and 1950.

3. The Tax Court erred in its determination that Vaughan
as not entitled to report as long term capital gain the gain
ro the heifers under 24 months of age sold in 1951 in partial
iq idation of its breeding herd.

SUMMARY OF ARGUMENT

. The applicable provisions of the Internal Revenue Code
er it a livestock owner to obtain capital gain treatment from
ro eeds of sale of livestock held for breeding purposes regard-
es of the age of the animal when sold and regardless of the
ac that such animal has not been bred or has not reproduced at
ne time of sale.

I. The evidence in this case clearly establishes that Vaughan
el all heifers raised during the tax years in question for
ed ing purposes and the determination by the Tax Court that all
ei ers under the age of 24 months were held by Vaughan primarily
or sale in their trade or business is clearly erroneous.

II The sale of heifers in 1951 after termination of the
an gement contract with Milford and after carrying the animals
ar ugh the winter season clearly establishes said heifers to be
em ers of the breeding herd and the subsequent sale of said heifers
nt tled Vaughan to capital gains on the proceeds of such sale.

ARGUMENT

HE APPLICABLE PROVISIONS OF THE INTERNAL REVENUE CODE ERMIT A LIVESTOCK OWNER TO OBTAIN CAPITAL GAIN TREATMENT ROM PROCEEDS OF SALE OF LIVESTOCK HELD FOR BREEDING URPOSES REGARDLESS OF THE AGE OF THE ANIMAL WHEN SOLD ND REGARDLESS OF THE FACT THAT SUCH ANIMAL HAS NOT BEEN RED OR HAS NOT REPRODUCED AT THE TIME OF SALE.

The Internal Revenue Code of 1939 was amended by Section 1() of the Revenue Act of 1942 and Section 127 of the Revenue t f 1943 to include as capital assets depreciable assets used te trade or business and held for more than six months. The enment was accomplished by adding Section 117(j) to the Code. atsection also provides that property which was properly cldible in inventory or was held by the taxpayer primarily r ale to customers in the ordinary course of a trade or busi- sswould not qualify as capital assets.

The Commissioner of Internal Revenue refused at first to conize that livestock could qualify for treatment under the pial gains provision. He next ruled that only those sales of eeing animals that constituted a reduction in the taxpayer's eeing herd would qualify as capital assets and then only after e nimals had been used for substantially all of their normal ef.l life as breeders.

The courts were more liberal in their interpretation of cton 117(j) than the Commissioner of Internal Revenue. As a sut of this conflict Congress amended Section 117(j) of the enal Revenue Code of 1939 by Section 324 of the Revenue Act 951 which specifically provided that the capital gains pro- sins were applicable to livestock, <u>regardless of age</u>, held for nths after acquisition for the years 1942 through 1950, and

ld for more than 12 months after acquisition in the year 1951 d he years following. The Congress of the United States was it specific in the legislation that age was not the prime qusite so long as the holding period was satisfied and the iml was held for breeding purposes whether or not the animal d eproduced at time of sale.

The courts in construing Section 117(j) of the Internal veue Code of 1939, after its amendment in 1951, in cases inlvng livestock have all been concerned with the problem of eter the animals sold were held primarily for sale to customers te ordinary course of the taxpayer's business or whether the imls in question were held for breeding purposes even though ve used as breeders. The cases on this subject disclose that e nswers to these problems are dependent on the facts in each se In each case the courts have looked to the intent of the xpyer, and the surrounding facts indicative of the intent.

Section 117(j) of the Internal Revenue Code of 1939 was ie to the Code by Section 151(b) of the Revenue Act of 1942 i rior to its amendment by the Revenue Act of 1951, provided fllows:

> "Definition of property used in the trade or business. For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade

or business. Such term also includes timber with respect to which subsection (k)(1) or (2) is applicable."

Section 117(j)(1) of the Internal Revenue Code of 1939 was ...ended by Section 324 of the Revenue Act of 1951, 65 U.S. Stat. ...1, as follows:

"Section 117(j)(1) is hereby amended by adding at the end thereof the following new sentences: 'Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry.' The first sentence added to section 117(j)(1) by the amendment made by this section shall be applicable with respect to taxable years beginning after December 31, 1941, except that the extension of the holding period from 6 to 12 months shall be applicable only with respect to taxable years beginning after December 31, 1950. The second sentence added to section 117(j)(1) by the amendment made by this section shall be applicable only with respect to taxable years beginning after December 31, 1950."

The Commissioner's Income Tax Regulations 118, Section 39, ...7j)(2) provides in part:

"(b) The determination whether or not livestock is held by the taxpayer for a draft, breeding, or dairy purpose depends upon all of the facts and circumstances in each particular case. The purpose for which the animal is held is ordinarily shown by the taxpayer's actual use of the animal. However, a draft, breeding, or dairy purpose may be present in a case where the animal is disposed of within a reasonable time after its intended use for such purpose is prevented by accident, disease, or other circumstances."

An instructive discussion of the provisions of Section 117(j) ...hey existed prior to the 1951 amendment and of the remedial ...ct intended by Congress in enacting the 1951 amendment to ...section, is set forth in McDonald v. Commissioner of Internal

ve ue, (1954)(CA-2), 214 F.2d 341, as follows:

> "Prior to this 1951 amendment the Commissioner had first refused to recognize that livestock could qualify for treatment under the capital gains provision, and then had ruled that only unusual reductions of herd would suffice. A series of adverse rulings in the courts, Albright v. United States, 8 Cir., 173 F.2d 339; United States v. Bennett, 5 Cir., 186 F.2d 407; Miller v. United States, D.C.Neb., 98 F.Supp. 948, led him to modify his position so as to allow such treatment of animals sold after being employed for substantially their full period of usefulness. Treas. Dept. Bull. June 17, 1951, Mim. 6660, 1951-2 Cum. Bull. 60. But all of the foregoing cases had given the section a far more liberal interpretation than this, granting favored treatment to the proceeds from young animals, and in two of the cases from heifers (females which had never dropped a calf).
>
> "When Congress undertook to amend §117(j)(1), it was made fully cognizant of this situation by representatives of livestock and breeding associations. Hearings before Committee on Finance on H.R. 4473, Revenue Act of 1951, Part. 3, pp. 1538, 1837, 2396; Sen. Rep. No. 781, 82d Cong., 1st Sess. 41-42. And it is manifest that the section was drafted with an eye to the breeders' complaints. Thus in defining property 'used' in the business the amendment speaks of livestock 'held' for an appropriate purpose, and adds the further proviso that it apply 'regardless of age.' The intent to repudicate the Commissioner's view is obvious, even without the specific statements in the Report of the Senate Committee on Finance, supra. And it is equally clear that the animal need not be mature and need not have been put to its intended use."

Also, Senate Report No. 781, 82d Congress, 1st Session, .Code Cong. and Adm. Ser., 1951, 2012, contains the following lnation of the 1951 amendment to Section 117(j):

> "Thus section 117(j) will apply to livestock used for draft, breeding, or dairy purposes, and to turkeys used for breeding

purposes, whether old or young; and the holding period will start with the date of acquisition, not with the date the animal or fowl is put to such use."

The provisions of Section 117(j) require that the livestock eld for breeding purposes, and also require that the livestock eld for that purpose for more than six months (or 12 months r1951) after the date of acquisition thereof. Whether an ial is held for breeding purposes and not primarily for sale eents a question of fact. . . United States v. O'Neill, (1954) A9) 211 F.2d 701, 702.

Generally, the cases involving livestock that have been tgated have considered the question of whether the animals l were held for sale in the ordinary course of business, and equestion of whether the animals qualified as breeding animals. nalysis of many cases on these subjects disclose that the sers to these problems are dependent on the facts in each s. In each case the courts have looked to the intent of the xayer, and the surrounding facts indicative of the intent. eof the first, in a long series of cases dealing with this tect, is Albright v. United States, (1949)(CA-8) 173 F.2d 339, eein the court allowed capital gains on the sales of animals c a dairy herd when it was no longer economically beneficial etain said animals. The same result was reached with respect he sale of breeding sows which were sold each year after iing only one litter. The decision in this case struck down eCommissioner's rulings on the subject as being incompatible t the laws passed by Congress. The court decided that even

ough it was the practice to sell culls from the breeding herd, were not held primarily for sale in the ordinary course of siness, and thus qualified as animals entitled to capital gain eatment under Section 117(j) of the Internal Revenue Code of 3 as it existed prior to the 1951 amendment thereto.

Another early case was United States v. Bennett, (1951) A5) 186 F.2d 407, wherein the court approved the treatment ain on sale of culls from the breeding herd as long term pital gain under Section 117(j).

In Fawn Lake Ranch Co., 12 T.C. 1139, capital gain was lwed on the sale of culls from the breeding herd, regardless nether or not they had produced calves, and regardless of efact that they were sold because they had not produced calves.

Another early case is Miller, et al v. United States, 91) USDC Neb., 98 F.Supp. 948. The court held that the annual l of heifers ranging in age from about 18 months to more than o years, sold because they were not likely to be good breeders, ntituted sale of capital assets and that capital gains resulted efrom. In reaching this decision, the court noted that the ner was saving all of his heifers in order to build back his herd to maximum capacity. The heifers sold had, prior to l, been included in the breeding herd and exposed to breeding. hese facts, which involve a herd of range cattle, and are ly identical with those present in this proceeding, the court ul that the heifers sold had been a part of the breeding herd were not animals held for sale in the ordinary course of siness.

In Pfister v. United States, (1952) USDC So. Dak., 102 F. p. 640, reversed on another point, USCA 8, 205 F.2d 538, the iers in question were raised by the plaintiff and were held r breeding purposes from their birth until they were about one a old. The heifers were separated from the rest of the herd ne spring of the year following the year of their birth. e they were more than a year old, they were turned in to a prate pasture along with the bulls, and thereby exposed to eding from July to the fall of said year in which so separated o the herd. In the fall of the year, after thus being used reeding animals, the heifers were sold. The evidence showed a said heifers were part of the plaintiff's breeding herd, i that they were sold because of the prevailing shortage of cssary ranch help. The court allowed Pfister to report the i on the sale of the heifers as capital gain. This part of e decision by the court was not disturbed by the Court of pals.

The cases of Pfister, Albright, Bennett and Miller, hereinfre discussed, were all decided prior to the effective date ne amendment to Section 117(j) contained in Revenue Act of 5. One of the first cases decided after the 1951 amendment s McDonald v. Commissioner of Internal Revenue, (1954)(CA-2) 4 .2d 341, which contains an excellent analysis of the law up hat time, and the effect of the amendments as heretofore dis- sed on page 14. The court emphasized that the intent of the xayer, in dealing with his animals, is controlling, and that e an animal is deemed part of the breeding herd from birth,

qualifies as an animal held for breeding purposes even though ay be disposed of before it has matured or before it has been tully used as a breeder. In the McDonald case, the taxpayer ned a herd of thoroughbred dairy cattle of championship quality. e herd was being increased in size during the period involved. Donald retained the best calves as part of the herd. The ling of the offspring commenced when the calves were very ung and was a continuous process. The question involved was e nature of the proceeds received from the sale of cattle that re culled out of the herd and sold. The court noted that the rpse for which an animal is held is essentially a question of ct. The court treated the proceeds from the sale of animals ld from the breeding herd as capital gains despite the fact a the taxpayer knew, at the time that each annual crop of imals was added to the breeding herd, that part of said animals dded to the herd would develop undesirable characteristics ereby require the culling that ultimately occurred. The u stated:

> "Of course it was in the taxpayer's contemplation that many or most of the animals would be found wanting and be sold. The operation might perhaps even have proved unfeasible without the income thus derived. And in a very real sense the taxpayer could have said at any moment that most of his calves were held for possible sale. But this was not the motive behind their retention, and legislative history of the new law shows that motive is to be controlling. And it is this new law which is and must be decisive."

In O'Neill v. United States, USDC, S. Dist. Cal., 52-2 USTC r. 9462, aff'd CA-9, 211 F.2d 701, the taxpayer contested the

mmssioner's determination that gain on sale of certain heifers
s rdinary income. The taxpayer was beneficial owner of part
atrust that operated a herd of beef cattle. The facts estab-
shd that the heifers sold in the year in question were sold
case of adverse water and range conditions. The heifers were
ord heifers, but would have been exposed to breeding and placed
te breeding herd except for the adverse range conditions. The
ur decided that the heifers sold were held by the trust for
eeing purposes within the meaning of Section 117(j) of the
enal Revenue Code, and had been held for more than six months,
is entitling plaintiff to report his proportionate share of the
ceeds as long term capital gain.

In Estate of C. A. Smith, 23 T.C. 690, Acq. 1956-1 CB 5,
etitioner raised thoroughbred Hereford cattle. He maintained
erds of cattle. The outstanding animals raised by the
itioner were in a segregated breeding herd, or were destined
b placed therein at the proper age. The remainder were
rgated in a sales herd. Frequently, animals of the breeding
d some of which had never been bred, were exhibited at stock
w and sold at auction thereafter. The court noted that the
emination of which animals, if any, were held by the petitioners
breeding purposes was essentially a question of fact. In its
ion, the court held that the animals sold, being of very
h quality, were those ordinarily retained as breeding stock,
ere sold only under unusual circumstances. The court held
t it made no difference that many of the animals had never
n used for breeding purposes. They had been held for breeding

poses, even though petitioner knew from year to year that tain of the animals selected for the breeding herd would be das show animals before breeding.

In Deseret Live Stock Company, Para. 53,093, P-H Memo. TC, petitioner operated a herd of range cattle. Ordinarily, the fers born to the herd were retained and added as replacement mals or to increase the breeding herd. As a result of drought poor range conditions, petitioners sold large numbers of fers in 1946, 1947 and 1948. Petitioners did not raise heifers sale in the ordinary course of business but raised them for eding purposes, and regarded all female calves from time of th as members of the breeding herd. The court allowed capital n on the sale of heifers held for breeding purposes since the e were not made in the ordinary course of business, but as esult of unusual circumstances.

Bartlett, Para. 55,259, P-H Memo. TC, is a case directly pint with the case here in litigation. The petitioners re operated a herd of cattle and expected to use practically emale calves to build the herd to the maximum capacity of arm operation. Ordinarily, the heifers would not have been i but in 1949 and 1950, the years in issue, petitioners were ne d of funds for ranch expansion and improvements, and these cu stances caused the petitioners to sell heifers out of the i In each of said years. The court found that all of the ma sales involved, except one where the animals were not held ore than six months, constituted sales of animals held for eding purposes which were entitled to capital gain treatment.

tle Bartlett case, of 26 heifers sold in 1949, 22 were 15 months
ae or younger, and of the 31 heifers sold in 1950, 27 were 14
ths of age or younger. In view of petitioners practice of not
eding his heifers until they were 15 to 18 months old, none
tle heifers sold were ever exposed to breeding. Nevertheless,
ourt concluded that said animals were held for breeding
poses and that the proceeds from sale thereof should be accord-
capital gain treatment.

The fact that immature animals constitute members of the
eding herd, if held for that purpose, was emphasized in Smith,
a 56,030, P-H Memo. TC. The court held that animals held for
eding purposes, even though too young for actual breeding,
situted animals held for breeding purposes.

A similar decision was reached in Miller v. Connell, USDC
t Dist. Mo., 56-1 USTC Para. 9528, 141 F.Supp. 361 (1956),
rin capital gain was allowed on the sale of heifers and cows
dfor breeding purposes, despite the fact that many did not
rduce during the period they were held as part of the breed-
erd.

In Carter v. Commissioner of Internal Revenue, (1958)(CA-5),
.2d 595, reversing in part 16 T.C.M. 280, the Court of
els held that the taxpayer was entitled to capital gain on
ale of heifers. The taxpayer had purchased 368 heifers and
hem on pasture in April, 1947. In June of 1947, registered
eord bulls were put in with the heifers to serve them. The
pyer was unable to feed the heifers in the winter of 1947-48
te range and therefore determined to sell them. The heifers

sold in March and April, 1948. The Court of Appeals decided the taxpayer had the requisite purpose and intent to, and held the cattle for breeding purposes, and allowed capital treatment on the sale of the bred heifers.

One of the more recent cases involving capital gain on of cattle is Harder, et al v. United States, 59-1, USTC, 9364, USDC East. Dist. Wash. Harder separated his young fers from his breeding herd until August of each year when were exposed to breeding at the age of 16 to 18 months. All fers born into the Harder herd were considered members of the eding herd. In the fall of 1954 and 1955 range conditions poor. Rather than expose the 16 to 18 month old heifers pregnancy, and place the bred heifers in his breeding herd, or sold the heifers. If Harder retained the heifers in the eding herd during 1954 or 1955, he would have been faced with uneconomical operation because he would have had to buy large nities of feed due to the poor range conditions. Harder ied capital gains on the sales of the unbred heifers, aged t 18 months, which were sold in the fall of 1954 and 1955, he court sustained said petitioner in his contention that apital gains so claimed were proper.

THE EVIDENCE IN THIS CASE CLEARLY ESTABLISHES THAT VAUGHAN HELD ALL HEIFERS RAISED DURING THE TAX YEARS IN QUESTION FOR BREEDING PURPOSES AND THE DETERMINATION BY THE TAX COURT THAT ALL HEIFERS UNDER THE AGE OF 24 MONTHS WERE HELD BY VAUGHAN PRIMARILY FOR SALE IN THEIR TRADE OR BUSINESS IS CLEARLY ERRONEOUS.

The facts in this case as established at trial through the timony of two of the partners and Milford thoroughly substan-

.at s the claim of petitioner that the heifers sold in the years
)48 1949, 1950 and 1951 were members of the breeding herd, and
re not held primarily for sale to customers in the ordinary
ur e of Vaughan's trade or business.

The Tax Court found as a fact consistent with the testi-
ne that the number of count cattle turned over to Milford
th the breeding herd was 1,364, or 64.95% of ranch capacity of
00 head of count cattle (R. 440). It goes without saying that
e reatest economic gain would be realized by both contracting
rt es by an operation at maximum capacity. Floyd and F. C.
st fied that it was their intent and they hoped that Milford
ul save back all heifer calves and build the herd back to its
rm r size of 2150 count cattle (R. 160-166, 410, 411). The
st mony of the partners as to their intent is on all fours with
e estimony of Milford. Milford was contractually responsible
: he management of the herd and determined the cattle to be
ld each year in consultation with Vaughan. Obviously, Vaughan
i o agree to the sale of enough cattle to permit Milford to
al ze sufficient funds to continue performance under the contract.
lf rd was informed by Vaughan that they had operated the ranch
$,000 per month for operating expenses in years immediately
lo to sale of the ranch to Milford (R. 335, 362). Had Milford
en able to operate as cheaply as Vaughan, it would not have
en necessary for so many of the heifers to be sold. He was not
le to operate as cheaply as Vaughan because there was only one
lf rd while there were three working partners in Vaughan.

Floyd testified that Vaughan had spent about 10 years in

illing the herd that was turned over to Milford under the ntact as of April 1, 1946 (R. 140). Vaughan took the herd Buneau, Idaho in the spring of 1940 at which time it contain- aproximately a thousand head of female cattle. In 1945, at e ime of the sale to Crabbe and the Hawes brothers the herd i een almost doubled and contained 2,150 head of count cattle . 38, 266). The herd was reduced in size by the Hawes brothers fo e the contract was rescinded, and contained only 1,364 count tte on April 1, 1946 (R. 79, 138, 161). Floyd and Vaughan te ded that the breeding herd turned over to Milford would be il back to its size prior to its partial liquidation by the we brothers. This was to be accomplished by retaining all if rs as part of the breeding herd (R. 160-162).

The contract empowered Milford to determine the animals to s ld after consulting Vaughan because Milford's operating funds i o come from sales from the herd (R. 85, 159). The operating pe se of ranching increased each and every year of the contract id occasioned the sale of heifers other than culls (R. 179, 0, 254, 268).

The heifer calves became members of the breeding herd at rt. They were never separated or segregated from the breeding rc but were exposed to the herd bulls from birth, except for a or period of the year when they were separated for winter feed- g. The weaner heifers were turned out each spring with the ed ing herd and were exposed to the bulls from May 1 until the l wing December when the cattle were gathered and placed on e feed lots. The weaner heifers turned out in March of each

ar were about one year old and were expected to breed by the
me they were 15 months old. About 50% would produce a calf by
e ge of 24 months (R. 241-246, inclusive).

The decision to sell the heifers in 1948, 1949 and 1950
s ade under identical circumstances in the fall of each year.
e eason the heifers were sold in each year was to provide
ff cient operating funds to Milford. The animals were gathered
d egregated at the Battle Creek Ranch in late summer. The
nb r of steers and culled cows were known at that time and
ei approximate weights and the market price on beef. If the
pe ted realization from the steers and cows did not provide
lf rd with sufficient operating funds, then certain heifers
re selected and sold to bring the sales proceeds up to a point
er Milford could operate on his share and meet his increased
pe ses (R. 180-197, inclusive).

Floyd testified that the heifers sold in 1948 were 24-30
nt s old and had been members of the breeding herd and exposed
te bulls for two seasons (R. 184). The heifers sold in 1949
re about the same age and had been members of the breeding herd
d xposed to the bulls for breeding for at least two seasons
. 89, 192). In 1950 there were three groups of heifers sold
ng ng in age from 12 to 24 months (R. 442), and had been members
te breeding herd and exposed to the bulls for breeding for at
as one season for the youngest group weighing 453 pounds each
d wo seasons for all of the others (R. 194, 195).

The sum and substance of Floyd's testimony was that Milford
pe ted to finance his operation of the breeding herd from his

ar of the proceeds from the sale of the steers and culled cows. e reeding herd was to be increased in size by the retention of l eifers. The only reason heifers were sold in each year was e ecessity to provide Milford with more money than had been ti ipated to meet the constantly rising costs of operation.

The testimony of Floyd was substantiated by the testimony F C. He testified that Milford intended to build the herd g enough during the contract period so that he would have a d of his own from the increase. The only way to do this was kep all the heifers, other than the culls, as breeders. F. C. e that he would do just that (R. 410, 411, 412). The decision s ll heifers was never made until it was apparent that Milford's r from the sale of steers and culled cows would be insufficient f nance his operation (R. 414-416). The contract was negotiated te parties and the terms were agreed upon after considerable cssion and consideration by the parties. Milford agreed to efor the cattle for one-half of the sales proceeds and one- f of the increase after making the original herd good because tought that he could operate on his share of the steer and ales and would have a good starter herd at the termination te contract from his share of the increase. The only way to rase this herd was by retention of all but the culled heifers 23-424).

The intent of Vaughan was subject to defeat by the sale of frs by Milford under the terms of the contract. What was lfrd's intent? His testimony was completely unbiased, he has outely no interest in the outcome of this litigation and his

st mony should not be discounted as self-serving statements. lf rd testified that it was his intent to, and he did treat all lf rs as members of the breeding herd from birth in order to ca a herd of his own from his share of the surplus animals te end of the contract (R. 280, 281, 304-07, 321-24, 327-28, 5-6, 357-58, 368-70, 372-73, 376-77). Based on the operating st of Vaughan in prior years Milford thought that he could er te on his share of the proceeds of the steers and the cow le (R. 335, 362). However, the increase in operating costs ch year exceeded the increase in the price of beef on the hoof l ilford was unable to operate as planned (R. 290-293, 367-70). e ecision to sell heifers, in excess of those normally culled om the herd each year as undesirable members of the breeding rd was made in the fall after the cattle were gathered and lf rd had calculated what his share of the sales price of the es and culls would be. Heifers were sold only to the extent esary to provide Milford with enough funds to repay the money hd borrowed during the year to finance the operation (R. 289, 0, 326).

The uncontradicted facts in this case disclose that all te heifers became members of the breeding herd at birth. ey were exposed to the bulls for breeding purposes, and as a ttr of fact, many of the older heifers had produced calves fce the sale. None of the heifers sold were ever segregated om the bulls and sold at a higher price as "open" heifers. The ly time heifers were sold was to provide Milford with enough ne to meet his obligation incurred in his performance under

e ontract. All of the cows, bulls and heifers sold during the ar here involved were livestock held by Vaughan for breeding rposes and held for more than 12 months from the date of acquitin.

The Tax Court has completely ignored the tests set forth te cases heretofore discussed. They decided that despite e ntent of Vaughan and Milford that all heifer calves became nbrs of the breeding herd at birth, that the number of heifers ld under the contract did not manifest such an intent. In comig the number of heifers sold under the contract, the Tax ur erroneously included in their computations the animals sold 146 and 1947 which were in the breeding herd originally turned erto Milford. In order to obtain an accurate comparison of the lfrs sold with those retained, the members of the original eeing herd that were sold should be eliminated. The following a more accurate comparison of the heifers sold with those proe:

	Heifers Produced (One-half of Calves Branded)	Sold (Raised Under the Contract)
1946	339	-0-
1947	302	-0-
1948	358	96
1949	267	207
1950	370	245
	1636	548

(R. 89, 92, 98, 107, 115, 377)

e eifers sold in 1946 and 1947 were sold out of the original eeing herd turned over to Milford. Only about one-third of the ifrs were sold to produce funds needed by Milford.

There is absolutely no evidence in this record to support

inding of the Tax Court that the heifers were held primarily
ale to customers in the ordinary course of business until
reached an age of 24 months. The Tax Court's reasoning is
nly unsupported by the evidence but is based upon an erron-
interpretation of the evidence presented wherein the court
it was important that :

1. Exposure to bulls was a meaningless act, except in rare and exceptional cases, until the heifers were at least 14 months old.
2. Normally the heifers do not produce a calf until they are 24 months of age.

The courts have long since rejected the contention that an
l is not a member of the breeding herd until it has actually
ced a calf. At the risk of being repetitious, it is impor-
to remember that in McDonald V. Commissioner of Internal
ue, (1954)(CA-2) 214 F.2d 341, the court emphasized that the
t of the taxpayer, in dealing with his animals, is controlling,
hat where an animal is deemed part of the breeding herd from
, it qualifies as an animal held for breeding purposes even
h it may be disposed of before it has matured or before it
een actually used as a breeder.

The exposure of a heifer to the bulls in a breeding herd
to the age of 14 or 15 months may be a useless act as deter-
by the Tax Court but it certainly is indicative of the
t of the owner of that herd that every heifer is a member
e breeding herd. Additional evidence of such intent is the
that all of the weaner heifers 12 months and older were

uned as breeders in ascertaining the number of bulls required de Idaho law to properly care for the breeding herd. It should so be noted that "open" heifers, those not exposed to breeding, was brought a higher price when sold.

The Tax Court's determination that the heifers were sub- ct to sale at any time during the period from 14 to 24 months nt visibly pregnant (R. 453) simply is not supported by the co d.

All of the testimony of Milford, Floyd and F. C. shows at the only time heifers were put up for sale, other than the ll, was in the early fall of the year after it had been deter- ne that the steers and culled cows and heifers did not produce ou n cash to enable Milford to pay off his debts incurred under e anagement contract. The visibly pregnant animals were not ld because they were more valuable to petitioners with calf an an animal that was not visibly pregnant. The selection in e all was not made for purposes of keeping certain animals as ee ers but was made on the basis of which heifers should be sold en it became known that heifers would have to be sold.

The Commissioner's Regulations 118, Section 39.117(j)(2), pr, anticipate that even though animals are intended for ee ing, they may have to be sold where circumstances change and ch intended purpose is prevented by accident, disease, or other rc mstances. The "other circumstances" was held to be sale of ll in McDonald, supra; sale of heifers because of adverse ng conditions in O'Neill, supra, Deseret Live Stock Company, pr, Carter, supra, and Harder, supra; and sale of heifers to

ovide funds in Bartlett, supra. If the courts deciding the
ove cases had used the tests used by the Tax Court here, namely,
e age of the animals, and the number sold, none of the above
ses could have been decided in favor of the taxpayer. In Pfister,
Neill, Deseret, Bartlett, Carter and Harder substantial numbers
heifers and in some cases all of the heifers of a given age
ou were sold in one or more consecutive years. Similarly,
st of the heifers sold were 24 months of age or less. It is
ysal clear that the heifers sold out of the Vaughan herd were
ld only because of the changed circumstances contemplated by
e Regulations and any gain on their sale resulted in capital
in. The animals were not held primarily for sale in the
dinary course of Vaughan's business of raising and selling
ngyearling beef steers.

It is respectfully submitted to this Court that there is
soutely no evidence in the record to support the Tax Court's
cision and the decision should be reversed with respect to all
ifrs sold in the years 1948 through 1951. The Tax Court has
pled tests to the animals sold in this case that have been
ecfically repudiated by Congress and the courts with respect
wether or not animals were held primarily for breeding purposes.

I. THE SALE OF HEIFERS IN 1951 AFTER TERMINATION OF THE MANAGEMENT CONTRACT WITH MILFORD AND AFTER CARRYING THE ANIMALS THROUGH THE WINTER SEASON CLEARLY ESTABLISHES SAID HEIFERS TO BE MEMBERS OF THE BREEDING HERD AND THE SUBSEQUENT SALE OF SAID HEIFERS ENTITLED VAUGHAN TO CAPITAL GAINS ON THE PROCEEDS OF SUCH SALE.

Selection of cattle for the replacement herd to be returned
Vaughan under the contract, and division of the increase in the

commenced in January, 1951 and was completed on or about
1, 1951, the termination date of the agreement. In January,
Vaughan and Milford made a tentative division of the herd.
an had a total of 1,096 cows and 2-year old heifers to be
ned to them. Vaughan selected 850 cows and segregated them
Milford agreed to pay Vaughan for 250 cows. This satisfied
eplacement of the cows and older heifers which Vaughan was
led to receive. Of the 850 cows Vaughan selected, Vaughan
150 cows and their sucking calves and 196 cows without any
s back to Oregon and Milford agreed to put the rest of his
in the remaining cattle. Of the cattle moved to Oregon, 202
were sold to one Barlow because he could not run them on
r Grazing Act land unless he owned them.

Vaughan returned to Idaho about April 1, 1951. They could
accommodate all of the remaining cattle which they owned, and
unable to reach an agreement with Milford to continue taking
of the cattle, sold 200 cows out of the remaining 500 to
rd (R. 203). There were also 450 animals left in the yearling
p. Vaughan was entitled to 230 as replacements plus one-half
e remaining 220, or a total of 340 head of yearlings divided
lly between steers and heifers, each numbering 170 (R. 203).
an did not have facilities for these cattle and sold all of
to Milford.

Vaughan claimed capital gain on the sale of the 200 cows
n were categorized by the Tax Court as 150 cows between the
of 4 and 8 years and 50 heifers age 20 to 24 months. These
als had been accepted by Vaughan as part replacement of cows

d year old heifers and had been members of the breeding herd
d xposed to the bulls for breeding for at least two full
as ns (R. 315, 316).

The Tax Court in refusing capital gain treatment on the
hifers has completely overlooked the fact that these animals
re segregated as replacements of the original breeding herd to
r turned to Vaughan. Vaughan had accepted them as replacement
r reeding stock and sold them only because they had no facil-
ie for caring for all of their breeding herd. The 170 heifers
er 12 months old were sold to Milford for the same reason.
en if petitioner admits, arguendo, that heifers sold in the
ar 1948, 1949 and 1950 were not held primarily as members of
e reeding herd but were held for sale to customers in the ordin-
y ourse of their trade or business, it is respectfully sub-
tt d to this Court that it simply is not true that the conditions
ev iling in 1951 were the same as those existing in prior years.
it obviously, if any heifers sold April 1, 1951 were held for
le they would have been sold in the fall of 1950 when they
re in the best shape to be sold as beef and not carried through
e inter on a feed lot.

The Tax Court made the following finding of fact, which is
pl supported by evidence produced at the trial, that:

> "At the termination of the contract in 1951, the Vaughan partnership did not have available facilities sufficient to accommodate all of the animals to which it was entitled. Certain range lands had been leased in Oregon to accommodate some of the animals; but despite a 2-year search, the partnership had been unable to locate satisfactory facilities to which to remove the entire replacement herd and increase for further operation. No agreement could be reached with Milford to continue running some

s quite obvious that the heifer sales in 1951 to Milford and esale of heifers to Robert Vaughan in that same year was a rial liquidation of the Vaughan breeding herd. In the year 5 Vaughan was entitled to receive 1,520 cattle plus one-half he increase of 220, or 1,630 head of cattle. Vaughan's sales c that breeding herd in 1951 were:

	Cows	Heifers	Bulls
To Milford	400	50 170	22
To Barlow	202		
To Robert Vaughan	____	60	___
Total	602	280	22

eremaining herd was disposed of and the partnership liquidated 952 (R. 252).

The Commissioner of Internal Revenue subbornly resisted treatment of gains from the sale of livestock as capital i from the time of the addition of Section 117(j) to the rnal Revenue Code of 1939 in 1942. However, despite this stance, the Commissioner did recognize as early as 1945 that realized on breeding animals in partial or complete liquida- of a breeding herd constituted capital gain. I. T. 3712, 5 C.B. 176, states in part:

> "I. T. 3666, supra, recognizes that the ordinary sales of livestock by a livestock raiser are productive of ordinary income, and abnormal sales which effect a reduction in the breeding herd are subject to the provisions of section 117(j) of the Code."

In I. T. 3712, 1945 C.B. 176, 177, the Commissioner of rnal Revenue described a situation that is precisely the same

ne situation with respect to 230 heifers in this matter and ld that the sale of yearling heifers held through the winter al be presumed to be held for breeding purposes. I.T. 3712, pa, provides in part:

> "Immature animals which have been retained by a livestock raiser for breeding purposes shall be considered a part of the breeding herd. Gains and losses from normal sales of such immature animals, however, in accordance with the foregoing principles, are not subject to the provisions of section 117(j) of the Code. Ewe lambs and heifer yearlings held through the winter shall be presumed to be held for breeding purposes. Heifer calves shall be considered to be held for breeding purposes if and to the extent that the livestock raiser normally keeps such heifer calves for breeding purposes." (Emphasis supplied)

Basic, fundamental common sense tells us that in order to e preserve a breeding herd at a given size, sufficient two- a old heifers and yearling heifers (those just over a year d must be retained in order to have ordinary replacements in efollowing years of the cows that die and those that are culled o the herd because of disease, injury, lack of milk, failure to ed, and similar causes. Despite the fact that Vaughan was red to sell every heifer they owned up through the age of 2 as, leaving absolutely none as ordinary replacements let alone yto increase the herd, the respondent's position that these ials were not part of the breeding herd was sustained by the xCourt. It is evident that the respondent in taking his position this matter has completely ignored his position in I. T. 3712, 4 C.B., 176, wherein a test to be used under the identical rumstances present here was prescribed as follows:

> "Since in many cases it will be found impractical to determine accurately the number of animals sold from the breeding herd, the following prima facie test is provided for the guidance of livestock raisers. If the number of animals sold from the breeding herd during a taxable year exceeds the number of raised animals added to the breeding herd during the same year, it will be presumed that the excess number sold consisted of animals held for breeding purposes, the gain or loss from which (if held for more than six months) is subject to the provisions of section 117(j) of the Code. Such sales effect a reduction in the livestock raiser's breeding herd."

I. T. 3712, supra, represented the Commissioner's position
rng the years 1945 through 1950. In essence, the Commissioner
ld that culls did not produce capital gain but partial liquida-
on of a breeding herd did qualify. In 1951, I. T. 3712 was
voked by Mim. 6660, 1951-2 C.B. 60, wherein the Commissioner of
ternal Revenue noted the decisions in the Albright and Bennett
ses, heretofore discussed under part I, and ruled that taxpayers
uld be entitled to capital gain if the breeding animals had
en used for substantially their full period of usefulness. The
sition stated in Mim. 6660 was withdrawn in Mim. 6776, 1952-1
B, 71, issued after Section 324 of the Revenue Act of 1951
ended Section 117(j) of the 1939 Code to explicitly and absolutely
ver livestock held for draft, breeding, or dairy purposes.

Certain principals advocated by the Commissioner of Internal
venue in I. T. 3712 were repudiated by the courts and by the
ongress in amending Section 117(j) regarding cattle. The Committee
eports reflect the liberalization intended by Congress in deter-
ining which animals were held as breeding stock. However, even
ough the Commissioner of Internal Revenue revoked I. T. 3712

or issuance of Mim. 6660 wherein he liberalized his view regard-
g breeding livestock, there is not one word uttered in Mim. 6660,
later publications, wherein the Commissioner of Internal Revenue
ve sed his early position stated in I. T. 3712, supra, that gains
animals sold in reduction or liquidation of a breeding herd
su t in capital gain. Nor was there any indication of a position
ar e that if heifer yearlings are carried through the winter and
er sold it is presumed the animals sold were breeding animals.
es views reflected actual realities in the industry, to-wit,
a animal was intended for sale as beef, it would be sold at a
me when the animal was in the best condition and it would not
arried through the winter on feed and then sold. Even though
T 3712 was later revoked, successive rulings liberalized the
mm.ssioner's views stated in I. T. 3712 rather than further
st ict capital gains on livestock held for breeding purposes.

If we apply the formula set forth in I. T. 3712 as a prima
c e test, there can be no question but that Vaughan is entitled
apital gains on heifers sold in 1951. The whole breeding herd
s liquidated and sold by Vaughan in 1951 and 1952 (R. 252).

The decision of the Tax Court that the situation in 1951
s not any different than that which existed in 1948, 1949 and
5(simply is not supported by the facts in the record. Their
c ion is in contradiction of their own findings that the situ-
io was changed in 1951, and finds absolutely no support in the
co d of this case, nor in Section 117(j), Internal Revenue Code
939, the history of that section, or the cases decided there-
de . The position of the respondent and the decision of the

x Court in this case represents a retrogression even beyond the mmissioner's original position of 20 years ago that the sale of ifers does not result in capital gains unless the herd is qidated.

There can be no disagreement here as to the facts. Vaughan d no place to care for the cattle and their breeding herd was qidated. This was done on a piecemeal basis but it was never-eess liquidated and the whole partnership passed out of existce in 1952. The heifers sold were held for more than 12 months inarily for breeding purposes. In view of the history of this cion of the Code, the amendment in 1951 to codify the expressed tnt of Congress to overrule the position of the Commissioner nternal Revenue, and the case law interpreting the section, s submitted that the decision of the Tax Court with respect 951 is completely erroneous because it is not supported by yevidence at all and should be reversed.

If there was ever any question of the intent of Congress llow capital gain on the sale of livestock held for breeding roses, the answer has been supplied in the addition of Section 4 to the Internal Revenue Code of 1954 in 1962. This section qires gain on sale of depreciable property to be reported as dnary income, except to the extent that the selling price ceds original cost price. Section 1245 is expressly made picable to all depreciable assets listed in Section 1231, trnal Revenue Code of 1954 (successor to Section 117(j), trnal Revenue Code of 1939) <u>except</u> livestock. Gain on live-ok held primarily for breeding purposes still results in

pital gain, whereas gain on sale of other depreciable assets ed in trade or business is to be taxed as ordinary income in e future.

Respectfully submitted,

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I certify that, in connection with the preparation of this if, I have examined Rules 18 and 19 of the United States Court ppeals for the Ninth Circuit, and that, in my opinion, the rgoing brief is in full compliance with those rules.

Frank E. Magee

Frank E. Magee, Attorney

No. 17848

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ENGELHARD INDUSTRIES, INC.,

Appellant,

vs.

RESEARCH INSTRUMENTAL CORPORATION dba ANALYTIC SYSTEMS CO.,

Appellee.

APPELLEE'S BRIEF.

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Appellee.

APPELLEE'S BRIEF.

I.

STATEMENT OF THE CASE.

Appellee controverts appellant's statement of the case in that it does not set forth the undisputed facts relied upon by the District Court in granting summary judgment.

SUMMARY OF STATEMENT.

District Court Judge Peirson M. Hall granted the defendant appellee summary judgment.

The complaint charged the appellee with infringement of Hersch Patent 2,805,191 and unfair competition in allegedly making use of the disclosure covered by the claims of said patent prior to the issuance of the patent.

The controversy before the District Court concerned the use of a battery or galvanic cell for the purpose

of determining the oxygen content of a gas. The battery or galvanic cell will produce a current by chemical reaction when oxygen is present in the battery or cell. The amount of current produced is read on an ammeter or other electrical measuring device and the amount of current so indicated represents the amount of oxygen.

Schematic drawings of batteries or galvanic cells including the Hersch device, prior art devices, and the appellee's device are found in Appendix A hereto. A similar sketch was before the District Court [R. 222].

The aforementioned sketches illustrate that in the operation of such devices, oxygen is brought into contact with one electrode of the battery, namely the cathode. The oxygen reacts with the liquid in the battery, known as an electrolyte, which causes the production of hydroxyl ions which in turn react with the anode, *i.e.* the other electrode in the battery, and produce a current which is measured on the ammeter or other current measuring device. In other words, the structure contains the same elements found in an ordinary car battery, two electrodes, *i.e.* a cathode and an anode, a solution of electrolyte, and when oxygen is fed into the battery a current is produced that is read off on an ammeter.

The alleged *novelty* in the device patented and claimed in the Hersch patent in suit *relates only to the* cathode. The Hersch cathode is positioned partly below and partly above the liquid level of the electrolyte in the cell and constructed and operated in such a manner as to keep the area of the cathode positioned above said electrolyte level *free* of a film of electrolyte.

At the time of appellee's Motion for Summary Judgment there was no genuine issue as to a material fact

concerning the construction and mode of operation of the cathode in the defendant appellee's device.

The appellant expressly admitted and appellee's exhibits demonstrate that in appellee's device the cathode is so constructed that the electrolyte *creeps up* that portion of the cathode above the liquid level of the electrolyte in the device and forms a film of electrolyte thereon.

Summary judgment was based on a legal construction given the claims of the patent in suit in view of the admissions and statements made to the Patent Office to obtain the patent. The Patent Office file wrapper relating to said admissions and statements was before the Court without dispute.

The said file wrapper of the patent in suit shows and the patentee Hersch testified that the novelty in the patented device resides in a cathode designed *to prevent the electrolyte from creeping up* the exposed portion of the cathode so that said portion of the cathode is *free* of a film of electrolyte.

In view of the foregoing record, the District Court held that because of the assertions made before the Patent Office, in order to obtain the Hersch patent, the appellant was estopped from contending that the Hersch patent covered appellee's device admittedly having a *cathode designed* to cause the electrolyte to *creep up* the portion of the cathode extending above the liquid level of the electrolyte in the cell and form a film of electrolyte thereon.

Since appellant's count for unfair competition is based only on the charge of the use of information covered by the claims of the patent in suit, during a period prior to the issuance of the patent, and since

the District Court held that appellee's device was not covered by the claims of the patent in suit, a dismissal of said count followed the dismissal of the count for patent infringement.

The appellant bases its appeal on untenable and untimely affidavits endeavoring to create an issue of fact that were filed *after* the Court granted appellee's Motion for Summary Judgment and upon statements in appellee's U. S. Patent 2,992,170 issued subsequent to the Motion.

The said affidavits are untenable in endeavoring to contradict a sworn admission under Rule 36 as to the operation of appellee's device and in endeavoring to present alleged expert testimony of a patent attorney to contradict the District Court's holding on the purely legal question of file wrapper estoppel. The said affidavits were filed by the appellant as a part of a motion for rehearing on the matter of the District Court's granting summary judgment and without any pretense of a showing as to why the affidavits were not *filed before* the summary judgment hearing in accordance with Federal Rule of Civil Procedure 56(c).

The aforesaid appellee's U. S. patent 2,992,170, far from creating an issue of fact, adds a decision of the Patent Office to that of the District Court distinguishing appellee's device from appellant's patent.

The District Court found that the documents submitted by the appellant in support of its motion for rehearing did not present any new or substantial evidence which would warrant the Court in reversing its decision.

APPELLEE'S STATEMENT OF THE CASE.

A. The Language of the Patent in Suit and the File Wrapper Thereof Limits the Claims in Suit to a Cathode Having a Specific Construction and Mode of Operation.

The claims of the patent in suit as finally allowed by the Patent Office are claims 1, 7, 10, 11, 12, 14, and 17. It will be noted that all of said claims contain language defining the cathode as having *an area thereof free of contact with the electrolyte* and a portion of the said cathode submerged below the liquid level of a substantially stagnant electrolyte [R. Deft. Ex. A]. All of the said claims except claim 10 are limited to an *imporous* cathode.

In order to obtain his patent, the patentee Hersch asserted to the Patent Office that his cathode was designed to prevent the electrolyte from *creeping up* the portion of the cathode positioned above the liquid level of the electrolyte in the cell and forming a film of electrolyte thereon.

A certified copy of the Patent Office file wrapper of the patent in suit was before the District Court and there is no genuine issue as to its contents [R. 242, lines 15-17, Deft. Appellee's Physical Ex. A].

The patentee's statements and admissions relative thereto will be more particularly hereinafter discussed and are found in the aforementioned record of the proceedings before the Patent Office to obtain the patent [R. Deft. Ex. A, pp. 47, 49, 54, 55, 59, 79, 96, 97, 98, 99, and 100].

The patent application as originally filed had thirty-three claims. These claims as filed did not specify a *cathode* having the exposed portion thereof *free of electrolyte* or means to prevent a film of electrolyte from forming on the said exposed portion of a cathode including a special cathode design and a stagnant electrolyte [R. Deft. Ex. A, pp. 23-31]. The following is claim 1 from the patent application as filed.

> "A method for detecting the presence of oxygen in a gas which comprises conducting such a gas past a water line formed by a cathode not attackable by oxygen and an electrolyte while the said electrolyte is in contact with said cathode and an anode oxidizable in the presence of oxygen but more noble than hydrogen to generate a measurable current which is a function of the oxygen content of the gas." [R. Deft. Ex. A, p. 23].

The Patent Office then cited the Haller patent U. S. 2,651,612 [R. 38]. Thereafter, all of the original thirty-three claims in the patent application were cancelled and claims numbered 34 through 51 were added. These claims were likewise cancelled.

In the Patent Office action found on page 82 of the file wrapper [R. Deft. Ex. A], the Examiner stated all of the claims in the application were not patentable over the aforementioned Haller patent. This action of the Examiner rejecting all of the claims was made final and the aforementioned claims 34 through 51 were cancelled [R. Deft. Ex. A, pp. 82 and 83]. Still later the claims in suit, *i.e.* claims 1, 7, 10, 11, 12, 14, and 17 all limited to a *stagnant* electrolyte and a cathode having the portion thereof above the liquid

level of electrolyte in the cell, *free* of electrolyte, were added and allowed but only after an oral interview stressing the limitations therein [R. Deft. Ex. A, pp. 83, 95].

As exemplary of the foregoing, claim 7 of the patent in suit is reproduced here below.

> "A method for detecting and measuring the presence of small amounts of uncombined oxygen in a gas while substantially obviating inaccuracies in the measurement due to drift, generation of local currents, insensitivity and irreproducibility which comprises establishing contact between a *substantially stagnant,* aqueous, potassium hydroxide *electrolyte* and a lead anode, maintaining *a cathode of imporous silver having a portion of its area free of contact with said electrolyte* and having a portion of its area partially submerged in said electrolyte thereby providing at least one line of contact between said cathode and electrolyte, said line of contact enabling said free area of said cathode, the electrolyte and the gaseous atmosphere surrounding said cathode to form a three-phase boundary, conducting a stream of gas containing uncombined oxygen past the said line of contact to cause the generation of an electric current between said anode and cathode which current is a function of the concentration of the gaseous uncombined oxygen in the stream of gas adjacent the cathode, and measuring the current generated between said anode and cathode." (Emphasis added.)

Prior to allowance of the claims of the patent in suit and to distinguish over the prior Haller patent U. S. 2,651,612 disclosing a silver cathode positioned partially above and partially below the liquid level of an electrolyte in a cell, the patentee's attorney made the following representations to the Patent Office.

> "It is an *essential* feature of the present invention that a substantial portion of the surface of the cathode be free of any contact with electrolyte in order that *oxygen molecules contained in gas passing over the cathode impinge on the exposed cathode surface directly from the gaseous phase without prior dissolution in the electrolyte.* (emphasis by patentee's attorney).
>
> ". . . Moreover, the cathodes employed in accordance with the principles of the present invention should be *imporous,* i.e., devoid of pores, to *prevent creeping* of the electrolyte on or along the exposed cathode surface such that a film of electorlyte would subsequently completely envelop the cathode. Observance of this feature advantageously assists in preventing the occurrence of an electrolyte film completely about the cathode surface and insures the attainment of high sensitivity and drift-free operation particularly at low oxygen concentrations." [R. Deft. Ex. A, p. 47] (emphasis added).
>
> * * *
>
> "Moreover, the electrolyte should be substantially stagnant in order that the meniscus forming the electrolyte-cathode-gas boundary be not substantially disturbed by the movement or flow of the

electrolyte. Any substantial movement of the electrolyte *causing even a thin film of electrolyte to adhere to and to envelop the exposed cathode surface would effectuate a condition wherein the oxygen-containing gas would first have to be dissolved in the electrolyte film before migrating to the cathode.* As mentioned hereinbefore, such a situation gives rise to a sluggish process and inaccurate results.

"From the foregoing, it becomes quite apparent that applicant's invention necessitates the utilization of cathode/electrolyte/anode combinations which function in such a manner that they are capable of satisfying applicant's stringent and special conditions such as set forth hereinabove." [R. Deft. Ex. A, p. 49].

* * *

"Furthermore, *it is essential, in accordance with applicant's principles and concepts,* for reasons set forth hereinabove, *that a substantial portion of the surface area of a cathode emerge from and be completely free of electrolyte.* At low oxygen concentrations, the sensitivity to oxygen in applicant's invention increases as the exposed surface area of the cathode area increases and which is not covered by electrolyte. This new and very striking concept is in no way disclosed or proposed by Haller. One highly satisfactory manner in in which applicant insures that his exposed cathode surface be maintained free of contact with electrolyte resides in applicant's principle that electrolytes employed in the present invention should

be *stagnant* or *substantially stagnant.* Thus, movement or flow of the electrolyte that would cause complete envelopment of the external exposed surface of the cathode by the electrolyte and the detrimental effects caused thereby are prevented. On the other hand, it will be observed that *Haller provides a system wherein the electrolyte is in a state of flow.* At column 2, lines 40 to 42, and the paragraph bridging columns 2 and 3, of the Haller disclosure, there is a clear and unequivocal teaching that Haller's electrolyte bleeds through his porous member and that the rate of flow of such electrolyte solution should be maintained such that it will provide an external solution (electrolyte) film. Moreover, it would appear from a perusal of the Haller disclosure that in employing his *mobile* electrolyte, i.e., a continuous rate of flow of electrolyte, that his external film of electrolyte enveloped the outer surface of his cathode in order that his oxidizing or reducing gas be dissolved therein." [R. Deft. Ex. A, p. 54] (emphasis by patentee's attorney).

* * *

". . . utilization of cathodes *wherein a substantial portion of the cathode surface is free of contact with the electrolyte employed in combination therewith;* and the utilization of stagnant or substantially stagnant electrolytes to *prevent the creeping thereof along the exposed cathode surface.*" [R. Deft. Ex. A, p. 55] (emphasis added).

* * *

In resubmitting the claims which were finally allowed, the patentee's attorney in support of those claims stated:

> "For example, each of the new apparatus claims require the structural feature of a substantial portion of the cathode employed in accordance with applicant's invention *be free of contact with the electrolyte and that a substantial area of the cathode is exposed to an oxygen-containing gas.*" [R. Deft. Ex. A, p. 96] (emphasis by patentee's attorney).

The patentee's attorney in furtherance of his efforts to secure the finally allowed claims additionally stated as follows:

> "It is likewise to be noted that applicant's requirements are just the *opposite* of those of Haller. Thus, applicant requires a *stagnant* electrolyte whereas Haller requires an electrolyte which '*bleeds through* the porous tubular section'. (See lines 40 to 42 of column 2 of Haller's specification) Applicant must maintain a *partially submerged* area on the cathode whereas Haller must maintain a *film* of solution on his porous section *completely* submerging his electrode. In lines 42 to 45 of column 2, Haller states that:
>
> > 'a film of solution is at all times maintained on the outside of the porous section in contact with the platinum electrode'.

In lines 45 to 48 of column 2, Haller also states that:

> 'When the gas mixture comes into contact with the *film* of electrolyte, the oxidizing or reducing gas dissolves reversibly therein * * *.'

Furthermore, Haller states in the passage beginning with lines 54 and 55 of column 2 and ending at line 5 of column 3 that:

> 'if the rate of flow of solution through the porous tube is insufficient to maintain the external solution *film,* the electrode may be externally washed with water or a suitable solution at a low rate sufficient only to maintain the solution film and avoid crystallization.'" [R. Deft. Ex. A, p. 100] (emphasis by patentee's attorney).

In addition to the limitations placed upon the claims of the patent in suit by the admissions and statements made to the Patent Office in order to obtain the issued patent over Haller, further specific and limiting language relative thereto is found in Col. 3, lines 15-40 of the Hersch patent as follows:

> "A substantial portion of the cathode area must be *free of any contact* with the electrolyte which is substantially *stagnant,* not agitated, i.e., the meniscus forming the electrolyte-cathode-gas boundary should not be substantially disturbed by movement of the electrolyte. Oxygen molecules are thereby enabled to be adsorbed on the electrode directly from the gas *phase without prior dissolution in the electrolyte.* While adsorbed, the molecules travel swiftly toward the water line where

they are ionized. If the cathode is completely submerged, as for example in polarographic methods of analysis, the oxygen molecules must first dissolve and then in the dissolved state diffuse towards the cathode. This is a sluggish process giving rise to small currents only. Even on applying agitation, at least a *thin film of* liquid adhering to the cathode would still have to be traversed and the current output would greatly depend on the manner and degree of such agitation. For high sensitivity and driftfree operation, particularly at low oxygen concentrations, the cathode should be comprised of an imporous or non-porous element, i.e., a body devoid of pores. Thus, for example, the cathode may take the form of a solid metal element such as sheet, wire, etc., or it may be in the form of gauze, the elements of which are solid strands. This ensures a geometrically well-defined meniscus free from creep by the electrolyte and such an electrode does not show aging effects as does, for example, porous carbon." [R. Hersch patent in suit, Col. 3, lines 15-40]. (Emphasis added.)

(1) Admissions by the Patentee Hersch During Deposition Limiting the Claims of the Patent in Suit.

The patentee Hersch's deposition has been taken. His testimony was in keeping with the statements made by his attorney to the Patent Office. He testified when examined by Mr. Bryan as a witness for appellant as follows:

"Q. So then you contemplated in your U. S. patent that there would in fact be a film of elec-

trolyte on your cathode, did you not? A. I do not contemplate taking any deliberate steps to produce a film of electrolyte on the exposed part of the cathode and I do not consider such a film as beneficial." [R. Tr. of Hersch Dep., p. 219].

(2) Additional Limiting Prior Art Not Cited by the Patent Office.

The claims of the Hersch patent in suit are further limited if not invalidated by prior art that was not cited by the Patent Office but was in the record before the District Court [R. A102, a translation of a prior German patent 749,603; R. A103, a prior Jacobson patent, U. S. 2,156,693].

The German patent 749,603 discloses the use of a galvanic cell to measure the oxygen content of a gas with the cathode positioned partially below and partially above the liquid level of the electrolyte in the cell. The patentee discloses that he had used metal plate, wire mesh, and porous cathodes such as carbon, sponge metal, and sintered metal and preferred the latter [R. 204 at 206, par. 2; R. 211, par. 2; R. 214]. The German patentee preferred to use a porous cathode. The type of porous cathode so preferred caused the electrolyte to *creep up* that part of the cathode extending above the liquid level of the electrotype in the cell and thereby form a film of electrolyte on a portion of the said part of the cathode.

"The nature of the invention is thus to be seen in this manner of operation that a gas electrode (already known as such) having a surface of a porous material capable of *absorbing* the electro-

lyte, such as for example electrode carbon, metal sponge, or sintered metal powder, serves as the electrode in question, which dips only partially into the liquid, so that the depolarization current is generated at the particularly strongly developed *three-phase boundary.*" [R. 207] (emphasis added).

Thus, appellant is not only estopped by the file wrapper of the Hersch patent in suit from contending that the claims thereof cover a cathode having a film of electrolyte on any part of the exposed portion thereof but also by the aforementioned German patent 749,603. Unless the claims of the Hersch patent are limited to a cathode with its exposed portion completely *free* of a film of electrolyte the claims would be invalid as reading on the preferred embodiment of the said German patent.

The District Court did not reach the matter of the invalidity of the Hersch patent over the German patent 749,603 as urged by appellee in that the matter had become moot by the Court's holding of non-infringement [R. 249, lines 31, 32].

In addition to the aforementioned patents, Hersch has admitted in a publication [R. Deft. Ex. K] published long prior to the instant litigation that he does not desire to use cathode materials that will cause the electrolyte to creep and he prefers a partly gas exposed non-porous metallic cathode in his device. Hersch admits further in this article that the patentee of the German Patent 749,603 had used the cathode Hersch uses prior to Hersch's work and rejected them for porous cathodes [R. Deft. Ex. K].

In view of the foregoing record, the District Court found as a matter of law that appellant was estopped to contend the claims of his patent cover a device in which the cathode is designed in such a way as to cause the electrolyte therein *to creep up* the portion of the cathode extending above the liquid level of the cell and form a film of electrolyte thereon.

B. The Proof in the Record as to the Construction and Mode of Operation of Defendant Appellee's Device.

(1) The Record at the Hearing on the Motion for Summary Judgment Raised No Genuine Issue of Material Fact as to the Construction and Operation of Defendant's Device.

In distinction to the device claimed in appellant's patent, the cathode in appellee's device is not constructed in a manner to *prevent* the electrolyte from *creeping* up the exposed portion thereof so as to keep said portion of the cathode free from and not covered by a film of electrolyte.

Appellee desires to have the electrolyte in its device *creep up* the unimmersed portion of the cathode to form a film of electrolyte thereon and its device is so constructed [R. 197, Ex. A100].

The defendant's device was before the Court [R. Deft. Appellee's Physical Ex. A100]. The affidavit of Reed C. Lawlor [R. 197] described the cathode in defendant's device as consisting of eight members partly immersed in the electrolyte, each of which is composed of folded wire mesh screen portions forming eight double screens, and is so constructed *that by means of capillary attraction,* the electrolyte *creeps* up said por-

tions of each of said eight cathode members extending above the liquid level of the electrolyte in the pool of electrolyte in defendant's device so as to *cause a film of electrolyte to cover defendant's cathode.*

The appellant offered no conflicting evidence as to the construction and operation of the defendant's device at the hearing on the Motion for Summary Judgment. The Court summarized the appellant's case before it as follows:

> "While the plaintiff has stated that there is a genuine issue as to the construction of defendants' device and its operation, that is merely a conclusion, and there is no counter-affidavit as to the method of construction or function of defendants' device. Hence, the Court must accept the description of defendants' device, together with viewing the object itself, as being true. There is thus no genuine issue as to the construction or operation of defendants' device (citing cases).
>
> "The affidavit of Bryan (R. 180) that the Patentee Hersch 'made an unequivocal statement in his presence,' to the effect that he considered the oxygen analyzer manufactured by the defendants to be 'an infringement' of the patent in suit, raises no genuine issue as to a material fact on the question of file wrapper estoppel, as it is hearsay, and at best, an expression of opinion by Hersch, and an opinion is not a fact. The affidavit of Cohn (R. 182), an expert, that in his 'opinion the oxygen analyzer manufactured by defendants is an infringement' of the patent in suit reaches no fact and creates no genuine issue.

"This is particularly so as to the opinions of both Hersch and Cohn because the plaintiff has one of defendants' devices and has operated it (Admissions No. 253 and 263), and had plaintiff desired to, it could have pointed out by affidavit the precise construction and operation of defendants' device which may, or may not, have raised a genuine issue.

"Moreover, by Admissions No. 256 and 257, plaintiff admits that defendants' device uses a wire screen cathode, and that the oxygen contacting the cathode has diffused through the electrolyte to the cathode. The latter is another way of saying that defendants' unimmersed portion of the cathode is *not 'free'* of contact with the electrolyte, as set forth in each of the claims in suit." [R. 242, line 28, to 244, line 1].

(2) Appellant's Attempt to Change the Record as to the Construction and Operation of Defendant's Device by the Submission of Additional Documents on a Motion for Rehearing.

The defendant appellee filed its notice of motion for summary judgment on May 31, 1961 [R. 87]. Appellee's motion recited that it was based upon the pleadings, the patent in suit and the file wrapper thereof, plaintiff's response to specific requests for admissions, answers to interrogatories, designated depositions, exhibits and admissions of appellant's counsel [R. 90-93]. In response to appellee's motion, the appellant filed a formal

document entitled "Statement of Genuine Issue of Material Facts in Opposition to Defendant's Motion for Summary Judgment" [R. 156], but in support thereof filed only the affidavit of Bryan [R. 180] and an affidavit of Cohn [R. 182].

The court rendered its decision on July 24, 1961 [R. 240] and stated that in arriving at its conclusion that it relied on "only the pleadings; the patent in suit; its file wrapper; the defendants's device, auto-optically; plaintiff's admissions Nos. 253, 256, 257, 263; the affidavits of Lawlor, Bryan and Cohn; and the numerous statements, arguments and briefs of counsel". The Court noted that other matters were irrelevant and immaterial on the issue of file wrapper estoppel which disposed of the case.

Appellant and appellee have reproduced, before this Court, all of the material portions of the record so referred to by the trial court.

After the decision of the trial court was rendered, but before formal judgment was rendered, the appellant filed a document entitled "Motion for Rehearing of Defendant's Motion for Summary Judgment" [R. 252]. The Court heard appellant's Motion for Rehearing on November 13, 1961 [R. 511] and did not find that appellant had presented any new or substantial evidence which would warrant the Court in reversing its decision [R. 438]. In support of this "Motion for

Rehearing" appellant filed the following documents:

(1) A second affidavit of J. Gunther Cohn [R. 404].

(2) A second affidavit of James Bryan (not brought up on appeal).

(3) An affidavit of a New York patent attorney, A. W. Deller [R. 416].

(4) An affidavit of B. B. Knapp [R. 425].

(5) A copy of appellee's Robinson Patent No. 2,992,-170 and the file history thereof issued June 11, 1961.

Appellant did not file any affidavit nor did it offer any evidence that any of the matters set forth in any of the above affidavits were unknown to it at the time of the hearing on the motion for summary judgment nor did appellant suggest any justification for submission of these documents after the decision of the court.

Although plaintiff admitted that in the defendant's device the only oxygen contacting the cathode is oxygen that is diffused through electrolyte to the cathode [R. 83, Appellant's Response to Defendant's request for admission No. 256] — Cohn argued to the *contra* in his second affidavit. Moreover, in May of 1961, which was prior to the hearing on the Motion for Summary Judgment on June 19 and 20, 1961, Cohn testified, after studying and photographing the defendant's cathode, that he knew of no portion thereof that was not covered by a film of electrolyte [R. Cohn Dep. May 24, 1961, p. 302, line 25, to p. 303, line 5]. Cohn testified in the said deposition as aforementioned, that

he had taken photographs of appellee's cathode, but refused to produce the said photographs at his deposition although he admitted that he had them in the room with him [R. Cohn Dep., pp. 229 and 230].

The Deller affidavit, also filed without any stated justification after the decision of the motion for summary judgment, related solely to the legal interpretation of the word imporous from the file wrapper of the patent in suit, a pure question of law.

The Knapp affidavit does not relate to the operation of appellee's device or the claims in the patent in suit. It is confined solely to a hearsay statement as to a device that was made by Hersch's employer, the Mond Nickel Company, and photographs thereof.

Finally, appellee's new Patent No. 2,992,170 was relied on in appellant's motion for rehearing. Far from creating an issue of fact, it simply added the decision of the Patent Office to that of the District Court in distinguishing appellee's device from appellant's patent. An embodiment found in said patent describes a device of the type made and sold by appellee. More particularly, column 2 of the patent, lines 5 through 17; column 4, lines 13 through 19; column 4, lines 65 through 70, all describe an oxygen analyzer having a cathode designed to cause the electrolyte to *creep up* the portion thereof above the liquid level of the electrolyte in the cell and to cover said portion with a film of electrolyte. It should be noted the Patent Office granted appellee's patent over the Hersch patent in suit as a reference.

APPELLANT'S CLAIM OF UNFAIR COMPETITION.

The appellant joined with its count for patent infringement a count for unfair competition [R. 4, pars. 1 and 2]. This count is based only on the charge that appellee used the same information set forth in the claims in the patent in suit during a period prior to the issuance of the patent. The record herein, as noted above in pages 20 and 21, demonstrates that appellee's device is not covered by the claims of the patent in suit. Upon this ground the District Court held as a matter of law that appellee was not guilty of unfair competition as charged in the complaint.

It should be noted that it was undisputed in the record that appellee Analytic Systems was organized after the issuance of the patent in suit, *i.e.* after September 3, 1957, and appellee did not build the accused device until November of 1957 [R. 39, Statement 108; R. 59]. Thus, it was undisputed in the record that all of the information covered by the claims of the patent in suit was published and in the public domain, except as protected by the claims of the patent under patent law, prior to the time the defendant built the accused structure [Bryan Dep., p. 151, line 13, to p. 152, line 18; p. 171, line 14, to p. 172, line 18]. Still further appellant's attorney admitted in open court that no trade secrets are or were involved in its charge of unfair competition [Tr. of Court Hearing September 12, 1960, p. 19, lines 12 to 14].

To complete the record before the District Court relative to appellant's claims herein, it should be noted that appellant, acting through its sales executive, acquired title to the patent in suit some time after appellee went in business and the prior owner of the said patent never made any claim that appellee was competing unfairly with it [R. 3, 28, 29; Admissions 73, 74, 76, 77, 78, and 79].

II.

THE ISSUES ON APPEAL.

A. Did the District Court err in holding that because of the admissions and accepted limitations found in the file wrapper of the patent in suit that the appellant was estopped as a matter of law from contending that the claims of the Hersch patent covered a device having a cathode designed to cause the electrolyte to creep up the exposed portion of the said cathode and form a film of electrolyte thereon?

B. Did the District Court err in finding that there was no genuine issue as to the material fact that the cathode in appellee's device was constructed and designed in such a manner as to cause the electrolyte to *creep* up the exposed portion of the said cathode and form a film of electrolyte thereon?

C. In light of the District Court's holding that appellee's device was not covered by the claims of the patent in suit, did the District Court err in holding that appellee was not guilty of unfair competition based on a charge of unfairly using information covered by the claims of the patent?

III.
SUMMARY OF ARGUMENT.

The appellee contends that there was no error in the court's ruling as a matter of law, on the scope to be given the claims of the patent in suit. The clear language of the patent specification, the claims as finally allowed over the Haller patent of record, and the statements made by the patentee's attorney to the Patent Office can lead to but one conclusion, *i.e.* that the appellant is estopped to contend the claims of the patent in suit cover a device designed to cause a film of electrolyte to *creep up* that portion of the cathode extending above the liquid level of the electrolyte in the cell and form a film of electrolyte thereon.

The District Court did not err in finding there was no genuine issue before it on the Motion for Summary Judgment as to the material fact that the cathode in appellee's device is designed and operated in such a manner as to cause the electrolyte to creep up the exposed portion of the said cathode and form a film of electrolyte thereon. Even the untimely Cohn affidavit filed on the motion for a rehearing admitted that appellee's device was so designed and operated.

The appellant's charge of unfair competition as found in the complaint is that appellee made use of the information covered by the claims of the patent in suit prior to the issuance thereof. In view of the record before the court, it is apparent that appellee did not compete unfairly as alleged, because as the District Court held appellee did not use the information found in the claims of appellant's patent. Moreover, appellant's counsel stipulated in open court that no trade secrets were involved and such an admission is fatal to the alleged cause of action under the law of this State and Circuit.

IV.

ARGUMENT.

INTRODUCTION.

The Court Below in Granting Summary Judgment Acted in Accordance With Rule 56 of Federal Rules of Civil Procedure, and Prior Decisions of This Court.

The judgment below was on appellee's Motion for Summary Judgment. Rule 56 of the Federal Rules of Civil Procedure directs that summary judgment "shall be rendered forthwith if the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The District Court disposed of the issue of patent infringement by determining as a matter of law from the file wrapper of the patent in suit that the claims as limited thereby did not cover appellee's device. The decision of the District Court is in keeping with prior decisions of this court and other Federal Courts holding that the matter of infringement is a matter of law when there is no genuine material issue of fact as to the construction and mode of operation of the accused device. This is particularly so where as in the instant case the dispute turns on a very simple question namely the construction and mode of operation of the cathode as claimed in the patent in suit. Thus, this Court, in *Rankin v. King,* 272 F. 2d 254, 258,

sustained summary judgment of a District Court even on a more extreme issue, *i.e.* the validity of a patent, stating as follows:

> "The mere presence of affidavits alleging questions of fact existed, or differing in interpretation and reading of the patent and various prior art, whether cited or non-cited, is of no consequence if the court did not consider such disputed facts. Here he specifically declined to consider such affidavits, but considered only the patent in suit, the alleged infringing product, the prior art cited in the file wrapper, and the non-cited prior art."

It is axiomatic that in patent litigation the matter of file wrapper estoppel is an equitable defense (*Aldrige v. General Motors* (1959), 178 F. Supp. 839 and cases there cited). When raised, this Court has held that it should be disposed of before the other issues are tried (*Moon v. Cabot Shops, Inc.* (9th Cir. 1959), 270 F. 2d 539, 545.

In *Dolgoff v. Kaynar* (D.C. S.D. Cal., 1955), 18 F. R. D. 424, 427, the District Court granted summary judgment in a patent case on the ground of no infringement and in support of its holding stated:

> "it seems settled that when there is no genuine issue of material fact bearing on the question of infringement, in that the structure and mode of operation of the accused device are such that they

may be readily comprehended by the court and understandingly compared in the light of the prior art with the device described in the patent in suit, without the need of technical explanation by expert witnesses, the court may and should grant summary judgment. See: Kwikset Locks, Inc. v. Hillgren, 9 Cir., 1954, 210 F. 2d 483, 488-489, certiorari denied, 1954, 347 U.S. 989, 74 S.Ct. 852, 98 L.Ed. 1123; Steigleder v. Eberhard Faber Pencil Co., 1 Cir., 1949, 176 F.2d 604, certiorari denied, 1949, 338 U.S. 893, 70 S.Ct. 244, 94 L. Ed. 548; Smith v. General Foundry Mach. Co., 4 Cir., 1949, 174 F.2d 147, 151, certiorari denied, 1949, 338 U.S. 869, 70 S.Ct. 144, 94 L.Ed. 533; Stuart Oxygen Co. v. Josephian, 9 Cir., 1947, 162 F.2d 857, 859; Alex Lee Wallau, Inc. v. J. W. Landenberger & Co., D.C. S.D.N.Y. 1954, 121 F. Supp. 555; Hendel v. Kam Water Heater Mfg. Co., D.C.E.D.N.Y. 1953, 114 F. Supp. 567, 569; Montmarquet v. Johnson & Johnson, D.C.D. N.J. 1949, 82 F.Supp. 469, 474, affirmed 3 Cir., 1950, 179 F.2d 240, certiorari denied, 1950, 339 U.S. 979, 70 S.Ct. 1025, 94 L.Ed. 1384; cf. Parke, David & Co. v. American Cyanamid Co., 6 Cir., 1953, 207 F.2d 571."

A. The District Court Did Not Err in Holding That in View of the Express Disclaimers, Admissions and Limitations Found in the File Wrapper of the Patent in Suit That the Appellant Was Estopped as a Matter of Law From Contending That the Claims of the Hersch Patent Covered a Device Having a Cathode Designed to Cause the Electrolyte to Creep Up the Exposed Portion of the Said Cathode and Form a Film of Electrolyte Thereon.

As the District Court pointed out, the Hersch patent in suit and the defendant's device both disclosed an enclosed area, an electrolyte (electrical conductor) liquid or aqueous in form, an anode (positive pole) completely immersed in the electrolyte and a cathode (negative pole) only partly immersed in the electrolyte.

The dispute, the District Court noted, turns upon the simple question as to whether or not in the claims in suit the portion of the cathode not immersed in the electrolyte must be constructed in such a fashion as to *prevent* the electrolyte from "creeping up" the portion of the cathode above the liquid level of the electrolyte so as to keep said portion thereof free of a film of electrolyte, and whether or not appellee's device is so constructed [R. 242].

The Court approached the problem, as it necessarily was required to do by first determining the scope of the claims in appellant's patent in suit by a study of the patent and the file wrapper thereof.

The use of the proceedings before the Patent Office to determine the scope of the claims in a patent has long been recognized in the Federal Courts. Under

this practice the proceedings before the Patent Office may estop a patentee from contending for a certain construction of the claim of his patent or aid in construing any portion of the language of the specification or claims of a patent that is unclear. Thus, in the early case of *Shepard v. Carrigan,* 116 U. S. 593, 597, 6 S. Ct. 493, 29 L. Ed. 723, the Supreme Court had before it the question as to whether a patentee who had limited his claim after rejection by the Patent Office could expand it again after the issuance of the patent to cover the accused device. In rejecting the patentee's assertion, the court said:

> "Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the patent-office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. *Leggett v. Avery,* 101 U.S. 256; *Goodyear Dental Vulcanite Co. v. Davis,* 102 U.S. 222-228; *Fay v. Cordesman,* 109 U.S. 408; S.C. 3 Sup .Ct. Rep. 237; *Mahn v. Harwood,* 112 U.S. 354-359; S.C. 5 Sup. Ct. Rep. 174; *Cartridge Co. v. Cartridge Co.,* 112 U.S. 624-644; S.C. 5 Sup. Ct. Rep. 475; *Sargent v. Hall Safe & Lock Co.,* 114 U.S. 63; S.C. 5 Sup. Ct. Rep. 1021."

To the same effect, see *Smith v. Magic City Kennel Club,* 282 U. S. 784, 789, 51 S. Ct. 291. There the court said:

> " 'Whether the examiner was right or wrong in rejecting the original claim, the court is not to

> inquire. Hubbell v. United States supra [179 U.S.] 83 [21 S.Ct. 24, 45 L.Ed. 95]. The applicant having limited his claim by amendment and accepted a patent, brings himself within the rules that if the claim to a combination be restricted to specified elements, all must be regarded as material, and that limitations imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and looked upon as disclaimers. Sargent v. Hall Safe & Lock Company, 114 U.S. 63, 865 S.Ct. 1021, 29 L. Ed. 67; Shepard v. Carrigan, 116 U. S. 598, 6 S.Ct. 493 [29 L. Ed. 723] supra; Hubbell v. United States, 179 U.S. 85, 21 S.Ct. 24 [45 L. Ed. 95] supra. The patentee is thereafter estopped to claim the benefit of his rejected claim or such a construction of his amended claim as would be equivalent thereto. Morgan Envelope Company v. Albany Paper Company, 152 U.S. 425, 429, 14 S. Ct. 627, 38 L. Ed. 500.' "

This Court has often adopted and applied this doctrine. Thus, in *D & H Electric Company v. M. Stephens Mfg.* (C. C. A. 9, 1956), 233 F. 2d 879, 883, this Court stated:

> "This is simply the exercise of the doctrine of 'file wrapper estoppel'—the gravamen of which is that an applicant who acquiesces in the rejection of his claim, and accordingly modifies it to secure its allowance, will not subsequently be allowed to expand his claim by interpretation to include the principles originally rejected or their equivalents."

Other cases so holding:

Van Brode Milling Company v. Cox Air Gauge Systems, Inc. (C. C. A. 9, 1960), 279 F. 2d 313, 316-317;

Bauer v. Yetter Manufacturing Co. (S. D. Ill. 1962), 205 F. Supp. 904, 909.

In the instant case the application of the principle of file wrapper estoppel was relatively simple and direct. From the discussion of the patent and the file wrapper thereof to follow, it will be noted as the District Court found that the patentee Hersch at all times contended that in the patented device the portion of the cathode extending above the liquid level of the electrolyte in the cell should be *completely free* of a film of electrolyte. In order to keep the said portion of the cathode free of any film of electrolyte the patentee Hersch specified that the electrolyte must be stagnant and the cathode constructed of a material that would *prevent* any creep of electrolyte up the portion of the cathode extending above the liquid level of the electrolyte in the device. In the patent, column 3, lines 15 through 42, the patentee states as follows:

> "A substantial portion of the cathode area must be free of any contact with the electrolyte which is substantially stagnant, not agitated, i.e., the meniscus forming the electrolyte-cathode-gas boundary should not be substantially disturbed by movement of the electrolyte. Oxygen molecules are thereby enabled to be adsorbed on the electrode directly from the gas phase without prior dissolution in the electrolyte. While adsorbed, the molecules travel swiftly toward the water line where

they are ionized. If the cathode is completely submerged, as for example in polarographic methods of analysis, the oxygen molecules must first dissolve and then in the dissolved state diffuse towards the cathode. This is a sluggish process giving rise to small currents only. Even on applying agitation, at least a thin film of liquid adhering to the cathode would still have to be traversed and the current output would greatly depend on the manner and degree of such agitation. For high sensitivity and drift-free operation, particularly at low oxygen concentrations, the cathode should be comprised of an imporous or non-porous element, i.e., a body devoid of pores. Thus, for example, the cathode may take the form of a solid metal element such as sheet, wire, etc., or it may be in the form of gauze, the elements of which are solid strands. This ensures a geometrically well-defined meniscus free from creep by the electrolyte and such an electrode does not show aging effects as does, for example, porous carbon."

The language of the specification of a patent, as above, can of course be used to construe the claims of a patent. See *Schnitzer v. California Corrugated Culver Company* (C. C. A. 9, 1944), 140 F. 2d 275, 276, and cases cited therein.

Seldom has an applicant for a patent, gone to the ends noted in the file wrapper of the patent in suit, to more *specifically limit a single element* in a combination patent.

The file wrapper of the prosecution of the patent in suit is reviewed on pages 6 through 13 hereof.

The file wrapper [R. Deft. Ex. A] is also before this Court. As there noted, the applicant presented and cancelled a total of fifty-one claims before the Patent Office Examiner was convinced that the claims defined the invention described in the language of the patent specification and distinguished over the prior Haller patent U. S. 2,651,612.

The claims originally presented were not limited to a cathode having its exposed portion free of electrolyte or means to prevent a film of electrolyte from forming on the cathode including a special cathode design and a stagnant electrolyte [R. Deft. Ex. A, pp. 23-31]. Original claim 1, for example, simply required the cathode to be in contact with an electrolyte [R. Deft. Ex. A, p. 23]. Original claim 9 called for the cathode to be positioned partially below and partially above the liquid level of the electrolyte in the cell, *i.e.* partially submerged in the electrolyte [R. Deft. Ex. A, p. 25]. As aforementioned, said claims and a total of fifty-one claims were rejected.

The patentee's attorney urged at great length as may be noted from the defendant's Exhibit A and as aforementioned it was an essential feature of the patentee's invention that the electrolyte be *stagnant* and that the cathode be so designed as to prevent *any film of electrolyte* from creeping up that portion of the cathode extending above the liquid level of the electrolyte in the cell [R. Deft. Ex. A, pp. 47, 49, 54, 55, 59, 79, 96, 97, 98, 99, and 100].

The foregoing record is summarized below and it is undenied in the record that the claims in suit are limited to a cathode having the portion thereof extending

above the liquid level of the electrolyte in the cell entirely free of a film of electrolyte.

1. "It is an essential feature of the present invention that a substantial portion of the surface of the cathode be free of any contact with electrolyte in order that oxygen molecules contained in gas passing over the cathode impinge on the exposed cathode surface directly from the gaseous phase without prior dissolution in the electrolyte." [R. Deft. Ex. A, p. 47].

2. . . . "Moreover, the cathodes employed in accordance with the principales of the present invention should be *imporous,* i.e., devoid of pores, to *prevent creeping* of the electrolyte on or along the exposed cathode surface such that a film of electrolyte would subsequently completely envelope the cathode. Observance of this feature advantageously assists in preventing the occurrence of an electrolyte film completely about the cathode surface and insures the attainment of high sensitivity and drift-free operation particularly at low oxygen concentrations." [R. Deft. Ex. A, p. 47] (emphasis added).

3. "Moreover, the electrolyte should be substantially stagnant in order that the meniscus forming the electrolyte-cathode-gas boundary be not substantially disturbed by the movement or flow of the electrolyte. Any substantial movement of the electrolyte *causing even a thin film of electrolyte to adhere to and to envelope the exposed cathode surface would effectuate a condition wherein the oxygen-containing as would first have to be dis-*

solved in the electrolyte film before migrating to the cathode. As mentioned hereinbefore, such a situation gives rise to a sluggish process and inaccurate results.

"From the foregoing, it becomes quite apparent that applicant's invention necessitates the utilization of cathode/electrolyte/anode combinations which function in such a manner that they are capable of satisfying applicant's stringent and special conditions such as set forth hereinabove." [R. Deft. Ex. A, p. 49] (emphasis added).

4. ". . . utilization of cathodes *wherein a substantial portion of the cathode surface is free of contact with the electrolyte employed in combination therewith;* and the utilization of stagnant or substantially stagnant electrolytes to *prevent the creeping thereof along the exposed cathode surface.*" [R. Deft. Ex. A, p. 55] (emphasis added).

When the patentee testified in this case under oath, his testimony was in keeping with the above statements made by his attorney to the Patent Office:

A. "I do not contemplate taking any deliberate steps to produce a film of electrolyte on the exposed part of the cathode and I do not consider such a film as beneficial." [R. Tr. of Hersch Dep., p. 219].

It should be noted that the construction of the claims urged in the foregoing is in keeping with the clear teachings of the language of the Hersch patent in suit found in Column 3, lines 15-42 thereof, which specifies the operation of the device requires the oxygen to impinge on the substantial area of the cathode

that is entirely free of a film of electrolyte and thereafter migrate down the cathode to the water line or liquid level of electrolyte in the cell. It is specifically pointed out that the cathode should be constructed in such a manner to prevent electrolyte from creeping up the portion of the cathode above the liquid level of the electrolyte in the cell. It is further stated that the electrolyte should be stagnant and the cathode should be made of an imporous or non-porous element, *i.e.* a body devoid of pores.

In addition to these express limiting admissions by the patentee and the express disclaimers by the patentee to the effect that the exposed portion of the cathode must be completely free of even a film of electrolyte and that a non-porous material and a stagnant electrolyte must be employed in order to accomplish this result, the patentee, after his claims were rejected over the Haller patent, formally accepted these limitations in redrafting the claims to include language in keeping therewith. Thus, in all of the claims in suit, *i.e.* 1, 7, 10, 11, 12, 14 and 17, the limiting language is included requiring that the exposed portion of the cathode be free of electrolyte and the electrolyte kept stagnant to insure this result. Moreover, in each of the said claims, except claim 10, the patentee specified a cathode of an imporous material. Even in claim 10, the patentee designated a metal cathode and it is clear from the specifications and the file wrapper statements, as cited above, that all of said claims must be read to require a cathode that would *prevent* the electrolyte from creeping up on that portion of the cathode extending above the liquid level of the electrolyte in the cell.

The patentee *limited* all of the claims of the patent in suit in keeping with the foregoing testimony and representationts made to the Patent Office. The specific limitations in the aforementioned claims is set out below.

Claim 1 requires "contact between a substantially stagnant . . . electrolyte, maintaining a cathode of imporous precious metal having a portion of its area free of contact with said electrolyte and having a portion of its area partially submerged in said electrolyte."

Claim 7 provides for establishing contact between a "substantially stagnant . . . electrolyte . . . maintaining a cathode of imporous silver having a portion of its area free of contact with said electrolyte and having a portion of its area partially submerged in said electrolyte . . . thereby providing at least one line of contact between said cathode and electrolyte, said line of contact enabling said free area of said cathode, the electrolyte and the gaseous atmosphere surrounding said cathode to form a three-phase boundary."

Claim 10 of the patent provides for establishing contact between "a substantially stagnant . . . electrolyte, maintaining a metal cathode having a portion of its area free of contact with said electrolyte and having a portion of its area partially submerged in said electrolyte."

Claim 11 provides for establishing contact between "a substantially stagnant . . . electrolyte, maintaining a cathode of imporous precious metal

having a portion of its area free of contact of said electrolyte and having a portion of its area partially submerged in said electrolyte."

Claim 12 of the patent provides for an apparatus which includes "a cathode of imporous precious metal having an area free of an aqueous electrolyte and having an area partially submerged in said aqueous electrolyte maintained substantially stagnant thereon, said free area and said partially submerged area being exposed to said stream of gas whereby a three-phase boundary is formed . . .".

Claim 14 provides for an apparatus which includes "a cathode of imporous metal having an area free of an aqueous electrolyte and having an area partially submerged in said aqueous electrolyte maintained substantially stagnant thereon, said free area and said partially submerged area being exposed to said stream of gas whereby a three-phase boundary is formed . . .".

Claim 17 provides for "establishing contact between an aqueous electrolyte, maintaining a cathode of imporous precious metal . . . partially submerged in the electrolyte such that a portion of the area of the cathode is free of contact with said electrolyte while the remainder of its area is submerged in said electrolyte thereby providing at least one line of contact between said cathode and electrolyte, said line of contact enabling said free area of said cathode, the electrolyte and the gaseous atmosphere surrounding said cathode to form a three-phase boundary, maintaining said electro-

lyte in contact with said cathode in a substantially stagnant condition such that the meniscus forming the three-phase cathode-electrolyte-gas boundary is not substantially disturbed by movement of the electrolyte . . ."

These limitations in the claims were accepted by the patentee in order to overcome the rejection of his prior claims based upon the Haller patent. In Haller, it is clear that there is an exposed portion of the cathode with a film of electrolyte thereon, and means to cause a film of electrolyte to be so positioned [Deft. Ex. A, p. 100].

The limitations necessarily urged by the patentee Hersch to distinguish over the Haller patent was that the exposed portion of the Haller cathode had a film of electrolyte thereon and in Hersch's device there was no film of electrolyte on the portion of the cathode extending above the liquid level of the electrolyte in the device [R. .... Deft. Ex. A, pp. 47, 54, 55].

It is clear therefore in view of the law of file wrapper estoppel, that the appellant cannot now urge a construction for the claims of his patent that would cause them to read on a cathode having an electrolyte film on *any* portion thereof extending above the water line or the liquid level of the electrolyte in the device.

The appellant's brief does not meet or discuss the issues of file wrapper estoppel involved herein. The brief does not review the claims in the Hersch application as filed, the changes required therein to overcome the Haller patent U. S. 2,651,612 of record and the clear and unequivocal admissions made by the patent attorney prosecuting the application to the Patent Of-

fice requiring that the claims be construed in such a manner as would preclude their reading on appellee's device in which admittedly there is a *film* of electrolyte on the portion of the cathode extending above the liquid level of electrolyte in the device.

The appellant's comment in its brief to the effect that claims of different scope as to language in a patent are not to be interpreted in the identical manner does not change the foregoing. Here, *each* and *every* claim in suit is limited to a device having the portion of the cathode extending above the liquid level of the electrolyte free of any film of electrolyte. This, of course, is in keeping with the clear teaching of the specification — *that it was the object of the patentee to have the oxygen first impinge upon the exposed portion of the cathode that is entirely free of electrolyte and then migrate down the cathode and first contact the electrolyte at the liquid level in the cell.*

The appellant's device admittedly operates on a three-phase boundary principle. The three phases are, of course, the gas phase, the liquid phase and the solid phase and the three-phase boundary is the common meeting point of the said phases. The three-phase boundary as used in the patent in suit is the meeting point of the gas sample containing oxygen, the stagnant liquid electrolyte and the metal cathode at the liquid level of the electrolyte.

The appellant cannot claim in effect that his invention includes all such devices having a three-phase meeting point without further limitations as to the *location* of the said meeting point or the nature of the electrolyte or the construction of the cathode in that

limitations relative to the said cathode and electrolyte were accepted and introduced into each of the claims of the patent in suit during the prosecution thereof before the Patent Office. Thus, as has been hereinbefore discussed, appellant's liquid phase, *i.e.* the electrolyte, must be stagnant, the portion of the cathode extending above the liquid level of the electrolyte must be entirely free of electrolyte. In other words, the meeting point of appellant's three-phases is at the *liquid level* of the electrolyte in the cell. It is clear from Column 3, lines 15 through 42 of the patent in suit, that appellant desired to have its oxygen impinge on a cathode *free of even a film* of electrolyte and first contact the said electrolyte at the liquid level of the electrolyte in the device.

Before the District Court the appellant admitted that in the appellee's device the gas sample does not come in direct contact with the cathode or solid phase (*i.e.* the *only* gas contacting the defendant's cathode is that which has diffused through a film of electrolyte (R. 83 Admission 256)) and hence there is no three-phase boundary.

On rehearing the appellant tried to raise new issues neither asserted nor passed on by the District Court at the hearing for summary judgment. The appellant argued that the appellee's cathode while designed to have a film of electrolyte creep up the exposed portion thereof the cathode was not 100% covered by electrolyte and that there were one or more three-phase boundaries formed by dry spots on the cathode above the liquid level of the electrolyte in the cell. Even if appellant's contentions are correct, appellant's patent still does not

read on this supposed construction of appellee's device. Appellant's patent as aforementioned is based on a three-phase boundary principle but is further limited to a three-phase boundary at the liquid level of the stagnant electrolyte. The Cohn affidavit admits that any three-phase boundary caused by bare spots on the appellee's cathode are above the liquid level and hence not within the limitations of the appellant's patent.

Appellant's belated attempt to have the Court ignore other limitations in the claims of the patent in suit and to construe the patent to cover any such device with a three-phase boundary without regard to location thereof at the water line would be fatal to the patent. It is clear that the prior art German patent [Ex. A102] that was not cited by the Patent Office discloses a cathode positioned partially below and partially above the liquid level in the cell and the specification thereof expressly calls out that said arrangement includes a three-phase boundary.

In other words, unless the appellant is content to have the claims of the patent construed to cover only a three-phase boundary arrangement located *at the liquid level of the electrolyte* in the cell and with the portion of the cathode extending above said level entirely *free* of electrolyte the claims of the patent must be held invalid as clearly reading on even the preferred species of the prior German Patent 749,603 [R. A102].

Still further in an article in Instrument Practice written by Hersch [R. Deft. Ex. K], the patentee of the patent in suit, Hersch points out other prior users that have used a three-phase boundary type of operation in a galvanic cell used for the purpose of measuring oxy-

gen. It is axiomatic that the construction of a patentee's claim in addition to being limited by the file wrapper also must be limited by the prior art [See *Tropic-Aire, Inc. v. Cullen-Thompson Motor Co.* (C. C. A. 10, 1939), 107 F. 2d 671, 674].

Appellant in its brief also endeavors to create a straw man of no moment relative to the limitations found in all of the claims, except claim 10, that the cathode must be imporous. It is clear from a reading of the file wrapper and by contemporaneous statements of the patentee Hersch found in defendant's Exhibit K, that by "imporous" Hersch means a cathode so constructed that the electrolyte will not creep up the portion of the cathode extending above the liquid level of the electrolyte in the cell. Thus, all of the claims, including claim 10, are necessarily so limited because it like all of the other claims requires that the electrolyte be stagnant and the portion of the cathode extending above the liquid level of the electrolyte in the cell be free of a film of electrolyte. It is clear therefore and particularly in view of the language on pages 49 and 54 of the file wrapper [R. Deft. Ex. A] that the cathode in appellant's device must be constructed in such a way as to prevent *all* creeping of electrolyte up the portion of the cathode extending above the liquid level of the electrolyte in the said device.

It is submitted therefore that the District Court did not err in holding that appellant was estopped from contending that the claims of the patent in suit cover a device having a cathode designed to cause electrolyte to creep up the portion of the cathode extending above the liquid level of the electrolyte in the cell and form a film of electrolyte thereon.

As aforementioned, and as will be hereinafter set forth, appellee's cathode is designed to cause a film of electrolyte to creep up the exposed portion thereof and form a film of electrolyte thereon and of course it follows that said cathode cannot be imporous as said term is used in the patent and the file wrapper thereof.

B. The District Court Did Not Err in Finding That There Was No Genuine Issue as to the Material Fact That the Cathode in Appellee's Device Was Constructed and Designed in Such a Manner as to Cause the Electrolyte to Creep Up the Exposed Portion of the Said Cathode and Form a Film of Electrolyte Thereon.

A. Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, supporting and opposing affidavits on motions for summary judgment must be made on personal knowledge and must set forth facts that would be admissible in evidence.

(1) There Was No Genuine Issue as to Any Material Fact Concerning the Construction and Operation of the Appellee's Device on the Motion for Summary Judgment.

The appellee's affidavit of Reed C. Lawlor [R. 197] is based on his personal knowledge and describes the cathode in the defendant's device as consisting of eight members partly immersed in the electrolyte, each of which is composed of folded wire mesh screen portions forming eight double screens, and is so constructed *that by means of capillary attraction,* the electrolyte *creeps* up said portions of each of said eight cathode members extending above the liquid level of the electrolyte in the pool of electrolyte in defendant's device,

so as to *cause a film of electrolyte to cover defendant's cathode.* The defendant's device was also before the Court [R. Deft. Appellee's Physical Ex. A100].

The appellant offered no conflicting evidence to the foregoing construction and operation of the defendant's device at the hearing on the Motion for Summary Judgment. The only documents even submitted by appellant were the Bryan affidavit [R. 180] and Cohn affidavit [R. 182], neither of which sets forth any facts relative to the construction of appellee's device.

The District Court in finding that there was no issue as to a material fact as to the construction and operation of appellee's device followed prior decisions of this court and others as may be noted from the following:

> "While the plaintiff has stated that there is a genuine issue as to the construction of defendants' device and its operation, that is merely a conclusion, and there is no counter-affidavit as to the method of construction or function of defendants' device. Hence, the Court must accept the description of defendants' device, together with viewing the object itself, as being true. There is thus no genuine issue as to the construction or operation of defendants' device.

Radio City Music Hall v. United States (2d Cir. 1943), 135 F. 2d 715;

Engle v. Aetna Life etc. (2d Cir. 1943), 139 F. 2d 469;

Piantadosi v. Lowe's, Inc. (9 Cir. 1943), 137 F. 2d 535;

Gifford v. Travelers Protective Ass'n. (9 Cir. 1946), 153 F. 2d 209;

Duarte v. Bank of Hawaii (9 Cir. 1961), 287 F. 2d 51, 55.

"The affidavit of Bryan (R. 180) that the Patentee Hersch 'made an unequivocal statement in his presence,' to the effect that he considered the oxygen analyzer manufactured by the defendants to be 'an infringement' of the patent in suit, raises no genuine issue as to a material fact on the question of file wrapper estoppel, as it is hearsay, and at best, an expression of opinion by Hersch, and an opinion is not a fact. The affidavit of Cohn [R. 182], an expert, that in his 'opinion the oxygen analyzer manufactured by defendants is an infringement' of the patent in suit reaches no fact and creates no genuine issue.

"This is particularly so as to the opinions of both Hersch and Cohn because the plaintiff has one of defendants' devices and has operated it (Admissions No. 253 and 263), and had plaintiff desires to, it could have pointed out by affidavit the precise construction and operation of defendants' device which may, or may not, have raised a genuine issue.

"Moreover, by Admissions No. 256 and 257, plaintiff admits that defendants' device uses a wire screen cathode, and that the oxygen contacting the cathode has diffused through the electrolyte to the cathode. The latter is another way of saying that defendants' unimmersed portion of the cathode is *not 'free'* of contact with the electrolyte, as set forth in each of the claims in suit." [R. 242, line 28, R. 244, line 1].

It is submitted that in view of the foregoing the District Court did not err in holding that the afffidavits of Bryan and Cohn relied upon by appellant in opposing appellee's Motion for Summary Judgment were insufficient to raise a genuine issue of fact. This Court's attention is invited to its aforementioned decision in *Piantadosi v. Lowe,* 137 F. 2d 535, where at page 536, column 2, it was stated as follows:

> "Rule 56(e) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, declares with respect to summary judgments that: 'Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' Under this rule mere denials, unaccompanied by any facts which would be admissible in evidence at a hearing, are not sufficient to raise a genuine issue of fact."

It is clear from appellant's brief that appellant concedes that at least at the time of the hearing on the Motion for Summary Judgment, there was no affidavit or other evidence submitted by appellant to contradict the undisputed evidence submitted by appellee. It will be recalled that defendant's Motion for Summary Judgment was heard on *June 19 and 20, 1961* and granted by the Court on *July 24, 1961* [R. 240]. Appellant's Brief (pp. 16 to 21) refers *only* to the affidavit of Dr. J. Gunther Cohn which was filed *September 13, 1961,* in connection with appellant's Motion for Rehearing. Thus, appellant does not contend that prior thereto there was any genuine issue of a material

fact before the District Court as to the construction and mode of operation of the defendant's device. Thus, the District Court's decision granting appellant's Motion for Summary Judgment was clearly proper.

(2) The District Court Did Not Abuse Its Discretion and Was Not in Error in Denying Appellant's Motion for Rehearing and in Entering Summary Judgment for Appellee.

The Federal Rules of Civil Procedure provide that affidavits opposing a Motion for Summary Judgment should be filed before the hearing thereon (Rule 56(c)).

Following the Court's decision granting the appellee summary judgment the appellant filed a Motion for Rehearing and submitted a number of additional affidavits which are referred to on pages 20 and 21 hereof and will be further hereinafter discussed. Appellee contends that these affidavits do not create any genuine issue as to a material fact that would preclude the District Court from properly holding that appellant is estopped from contending as a matter of law that the claims of the patent in suit do not cover appellee's device.

(a) The Additional Affidavits Relied on by Appellant at the Motion for Rehearing Were Not Timely.

It is no new experience for a District Court to find a losing party dissatisfied with a ruling granting summary judgment and for said party to thereafter submit additional documents. In view thereof a number of Federal Courts have held that the District Court may properly disregard affidavits filed after a Motion

for Summary Judgment, particularly where no showing has been made as to why they were not filed earlier.

George P. Converse & Co. v. Polaroid Corporation (1957 C. A. 1), 242 F. 2d 116, 121;

Clark v. Montgomery Ward & Company (1962 C. A. 4), 298 F. 2d 346, 349;

Atlas v. Eastern Air Lines, Incorporated (1962 C. A. 1), 311 F. 2d 156, 162.

In *George P. Converse & Co. v. Polaroid Corporation* (C. A. 1, 1957), 242 F. 2d 116, 121, the Court held that the refusal to entertain a petition for rehearing did not constitute an abuse of District Court's discretion in view of fact that supporting affidavit did not contain anything not known to the unsuccessful plaintiffs prior to hearing on the granting motion for summary judgment. The appellant here has made no showing as to why Cohn's second affidavit could not have been filed prior to the hearing on the Motion for Summary Judgment. The appellant presented no evidence at the hearing on appellee's Motion for Summary Judgment to contradict appellee's contention as to the construction and mode of operation.

In *Clark v. Montgomery Ward & Company* (C. A. 4, 1962), 298 F. 2d 346, 349, the Court of Appeals held that the District Court properly rejected an affidavit under Rule 56(c) of the Federal Rules of Civil Procedure because it was submitted after the hearing and decision on a Motion for Summary Judgment. The Court said:

> "Indeed, the fact that the plaintiff did not repudiate these statements (referring to defendant's statements) or attempt to explain them away

admission and earlier testimony in an effort to create an issue of fact as to the construction and operation of defendant's device. It will be recalled that in response to a request for an admission appellant admitted that in appellee's device the only oxygen contacting the cathode is oxygen that is diffused through electrolyte to the cathode [R. 83, Appellant's sworn response to Defendant's request for admission No. 256]. As the District Court stated, this is another way of saying the unimmersed portion of appellee's cathode is *not* "*free*" of contact with the electrolyte, as set forth in each of the claims in suit [R. 243, line 30, to R. 244, line 1].

In *General Construction Company v. Hering Realty Company* (D.C. E.D. So. Car., 1962), 201 F. Supp. 487, 493, the Court refused to permit a party to contradict an admission in an answer in an effort to oppose a Motion for Summary Judgment. The Court also stated at page 493 that clients are bound by admissions of facts made by their attorneys.

In *International Carbonic Eng. Co. v. Natural Carb. Prod.* (D.C. S.D. Cal., 1944), 57 F. Supp. 248, 253, (affirmed 158 F. 2d 285), the district court held that the plaintiffs were estopped from denying the truth of answers to requests for admissions made pursuant to Rule 36 of the Federal Rules of Civil Procedure.

Other cases relevant thereto are:

Woods v. Taylor (D.C. Tenn., 1949), 9 F. R. D. 537, 538;

Batson v. Porter (C. A. 4, 1946), 154 F. 2d 566, 568.

In any event the affidavit of Cohn is irrelevant in that it does not create a genuine issue on a material fact. It does not even purport to establish there is no film of electrolyte on the portion of appellee's cathode above the liquid level of the electrolyte in appellee's device. In fact, said affidavit states as to appellee's device [R. 409, lines 18 to 23]:

> "The cell consists of 8 pairs of vertical silver screens having nominally 80 mesh to the lineal inch. The screens are mounted so that they are partly immersed into a pool of a solution of potassium hydroxide. Due to the close spacing between the two screens of a pair the solution rises by capillary action above the liquid level of the pool almost to the top of each pair of screens."

In view of the above, it will be apparent that the Cohn affidavit *adds cumulative support to the fact that appellee's cathode is designed to cause the electrolyte to creep up the cathode.* This creeper type cathode construction in appellee's device spells out an operation exactly *opposite* of that contemplated by the device described and claimed in the Hersch patent. The Hersch patent as may be noted from the file wrapper thereof, *i.e.* defendant's Exhibit A at page 54, contemplates the use of a cathode and a stagnant electrolyte to

> "prevent the creeping thereof (referring to electrolyte) along the exposed cathode surface."

Hersch testified at his deposition when examined by Mr. Bryan as a witness for appellant as follows:

> "Q. So then you contemplated in your U.S. patent that there would in fact be a film of elec-

trolyte on your cathode, did you not? A. I do not contemplate taking any deliberate steps to produce a film of eletrolyte on the exposed part of the cathode and I do not consider such a film as beneficial." [R. Tr. of Hersch Dep., p. 219].

In the foregoing appellee has pointed out that the affidavit of Cohn does not create a material issue as to the construction and operation of the appellee's device. Moreover it would not be an abuse of discretion for the District Court to disregard the Cohn affidavit as untimely in view of the applicable case authority heretofore discussed.

(b) The Knapp Affidavit.

The Knapp affidavit [R. 425] does not pretend to raise a genuine issue of fact relevant to the construction and mode of operation of the defendant's device.

(c) The Appellee's Robinson Patent U. S. 2,992,170.

Appellant contends that appellee's patent U. S. 2,-992,170 raises a genuine issue of fact. This patent is, of course, irrelevant to any of the issues raised by the pleadings [R. 2-6]. The charge in the complaint concerns a device made by appellee, not its patent. *Appellee's* patent, however, clearly spells out that appellee's device is designed in such a way as to cause the electrolyte *to creep up* on that portion of the cathode that is positioned above the liquid level in the cell [R. Robinson U. S. patent 2,992,170, column 1, lines 63-65; column 2, lines 5-17; column 4, lines 13-19, lines 65-70]. The Patent Office granted appellee patent over the Hersch patent in suit as a reference. Thus, if anything, the Patent Office decision rein-

forces the Court's finding that the cathode in the defendant's device differs in structure and mode of operation from that found in the Hersch patent in suit. Some courts in patent cases have held that where the defendant has acquired a patent this raises a presumption that there is no infringement of the plaintiff's patent particularly where as here the defendant's patent was granted over the patent owned by the plaintiff.

Automatic Toy Corporation v. Buddy "L" Manufacturing Company, Inc. (D. C. S. D. N. Y., 1938), 25 F. Supp. 520, 522 (affirmed 97 F. 2d 991);

Eastman Kodak Company v. McAuley et al. (D. C. S. D. N. Y., 1941), 2 F. R. D. 21, 23.

(d) *The Affidavit of Patent Attorney Deller.*

The Deller affidavit was also filed after the Court had granted appellee's Motion for Summary Judgment. It is untimely, an afterthought, and an effort to substitute a legal opinion of a New York patent attorney for that of a California District Judge on the law and only as to what imporous means from the file wrapper. The affidavit makes no mention of the construction and mode of operation of appellee's device nor does it discuss the meaning of the limitations in the claims of "stagnant" and "free of electrolyte."

The record remains clear that in appellee's device the cathode is designed to cause a film of electrolyte to creep up the portion thereof extending above the liquid level of the electrolyte in the cell and it was not error or an abuse of discretion for the District Court to hold that the documents filed by appellant on its Motion for Rehearing created no genuine issue of material fact relative thereto.

C. The District Court Did Not Err in Holding That Appellee Was Not Guilty of Unfair Competition Based on a Charge of Unfairly Using Information Covered by the Claims of the Patent in That It Is Undisputed From the Record That Appellee's Device Differs Both in Construction and Mode of Operation From That of Appellant's.

The charge of unfair competition herein is described in the second count of the complaint [R. 4, paras. 1 and 2]. The critical language thereof reads as follows:

> "Defendants have unfairly competed with the plaintiff by acquiring access on or about June 28, 1955 to information not known to the public relative to a working model of an oxygen analyzer *covered by the claims of the patent in suit.*" [R. 4, lines 22-25]. (Emphasis added).

Since the District Court found that appellee was not using the invention covered by the claims of the patent in suit and the complaint alleged the alleged unfair competition related thereto, it followed that appellee was not competing unfairly with appellant as charged in the complaint. Citing *American Securit Company v. Shatterproof Glass Corporation* (C.C.A. 3, 1959), 268 F. 2d 769, 774.

Additionally there was no dispute in the record before the District Court that all of the information claimed by the appellant as the subject of the unfair competition suit is set forth in the patent in suit [Bryant Dep., p. 151, line 31, to p. 152, line 18; p. 171, line 14, to p. 172, line 18].

Counsel for appellant stipulated in open court that no trade secrets are or were involved in its charge of unfair competition [R. Tr. of Hearing before the District Court Judge September 12, 1960, p. 19, lines 12 to 14].

It should be further noted that it was undisputed in the record that appellee Analytic Systems was organized after the issuance of the patent in suit, *i.e.* September 3, 1957, and appellee did not build the accused device until November of 1957 [R. 39, Statement 108, R. 59].

Thus, it was undisputed in the record that all of the information claimed to have been misappropriated in the count for unfair competition was published and in the public domain, except as protected by the claims of the patent under patent law, prior to the time that Analytic Systems went into business and prior to the time appellee built the accused structure.

It requires no citation of authority to hold that appellee is not competing unfairly with appellant as charged in view of the undisputed record herein that appellee is not using any alleged contribution of appellant to the oxygen analyzer art. In fact, as has been heretofore pointed out even by appellant, appellee is making a device upon which it secured its own patent U. S. 2,992,170.

The District Court could have gone further and dismissed the complaint for unfair competition in keeping with a decision of this Court on the ground that no trade secrets were involved as admitted by appellant's counsel in open court. In *Rohr Aircraft Corporation v. Rubber Tek, Inc.* (C. A. 9, 1959), 266 F. 2d 613, 621, this Court affirmed the dismissal of a cause of action for unfair competition coupled with a count for

patent infringement where the record showed no trade secrets were involved.

It is clear from a number of authorities that appellant can have no proprietary rights in published information. These authorities were reviewed by appellee in its memo before the District Court and said cases are set forth in the record herein [R. 125-135].

Appellant in its brief herein makes no direct reply to the ruling of the District Court that appellee, as shown by the record, is not using appellant's contribution to this art. In lieu thereof, appellant argues without any reference to the record whatsoever that it "desires" to urge "trade secret information under an implied confidential relationship, which information was not disclosed in the later issued patent" (Appellant's Br. p. 30). This statement only adds to appellant's dilemma in that it is outside the charge found in the complaint [R. 4] and a belated attempt to repudiate the admission that counsel for appellant made in open court that no trade secrets are involved [R. Tr. of Court Hearing September 12, 1960, p. 19, lines 12 to 14]. It is axiomatic that appellant is bound by the admission of its counsel as stated in *General Construction Company v. Hering Realty Company* (D. C. Ed. So. Car., 1962), 201 F. Supp. 487, 493.

Finally appellant acquired the patent in suit after appellee was in business and the prior owner has never contended that appellee *ever* committed any act of unfair competition [R. 3, 29, Admissions 73, 74, 76, 77, 78 and 79].

Conclusion.

It is submitted that in view of the Record, the Judgment of the District Court should be affirmed and such action is solicited.

Respectfully submitted,

KENDRICK & STOLZY,
ELWOOD S. KENDRICK,
Attorneys for Appellee.

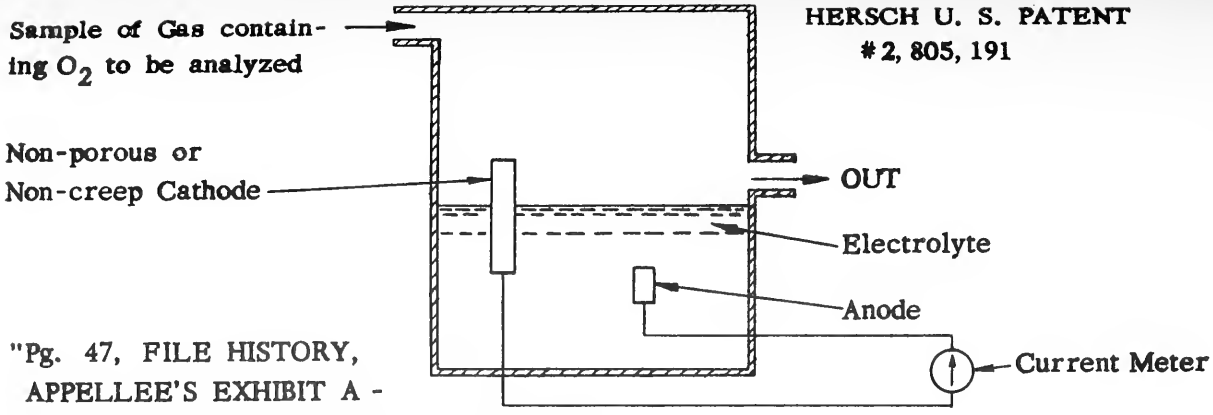
Of Counsel:
REED C. LAWLOR.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

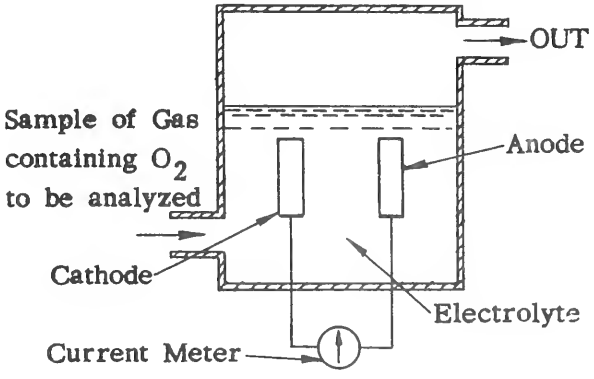
ELWOOD S. KENDRICK,

APPENDIX A.

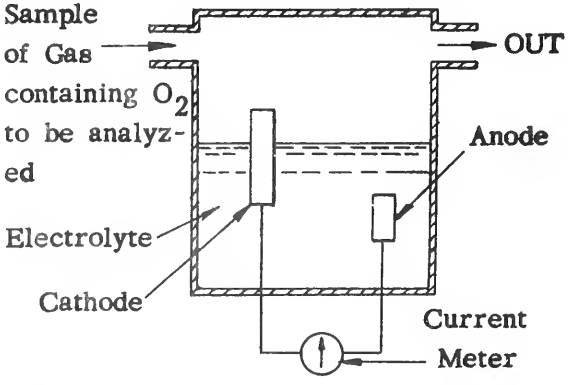


HERSCH U. S. PATENT #2, 805, 191

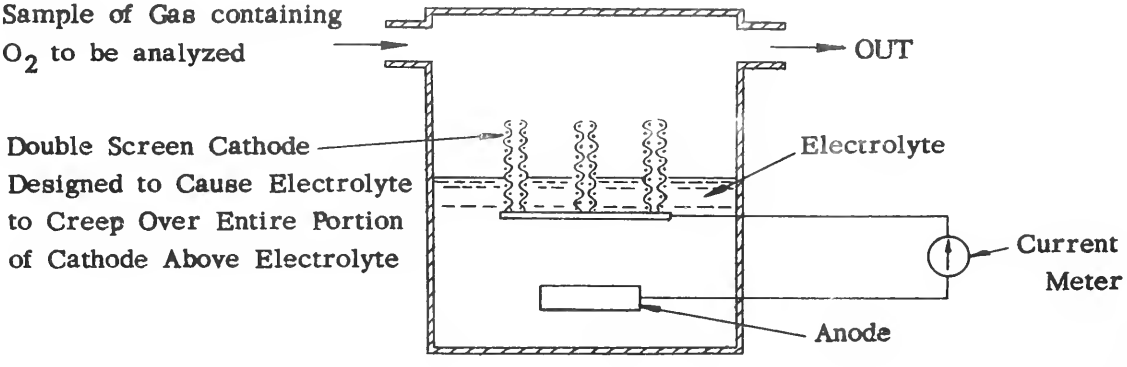
"Pg. 47, FILE HISTORY, APPELLEE'S EXHIBIT A - HERSCH DEPOSITION, Pg. 171, lines 8-13"



"ADMITTED PRIOR ART OF F. TODT" DEFENDENT'S EXHIBIT "K"



"GERMAN PATENT # 749, 603 - APPELLEE'S EXHIBIT A-102 HERSCH DEPOSITION - Pg. 93, line 24 through Pg. 94, line 26. JACOBSON PATENT - APPELLEE'S EXHIBIT A-103."



"APPELLEE'S EXHIBIT A100 - LAWLOR AFFIDAVIT [R. 199, lines 6-23]"

No. 17,848

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ENGELHARD INDUSTRIES, INC.,

Appellant,

vs.

RESEARCH INSTRUMENTAL CORPORATION,

Appellee.

PETITION FOR REHEARING.

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No. 17,848

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ENGELHARD INDUSTRIES, INC.,

Appellant,

vs.

RESEARCH INSTRUMENTAL CORPORATION,

Appellee.

PETITION FOR REHEARING.

To the Honorable Koelsch, Circuit Judge, Hamley, Circuit Judge, MacBride, District Judge:

The appellant, Engelhard Industries, Inc., respectfully petitions for a rehearing to reconsider the judgment entered in this action on October 28, 1963.

The petition for rehearing in this matter is directed solely to the opinion of this Court wherein the District Court's decision is affirmed insofar as non-infringement is concerned.

1. The first ground urged for rehearing is the statement of this Court that the District Court was entitled to conclude "from the materials before it on the hearing for the motion for summary judgment, that the accused analyzer did not incorporate this distinctive feature of the invention" (*i.e.* "free area") on the cathode. The Court states that there "was nothing else in the record to counter the showing made by Research" relative to the affidavit of "one Lawlor, a physicist."

2. The second ground urged for rehearing relates to United States Patent No. 2,992,170 which issued after the date of the hearing (rather than before the date of the hearing as printed in Footnote 5); said patent contains statements made by Research through its Patent Attorney Lawlor contrary to the District Court's interpretation of subsequent alleged facts of the affiant Lawlor.

Considering now the first ground, the motion for summary judgment as filed by Research did not include any affidavit. However, the motion did refer to and did enumerate some twenty-one sets of documents including sworn admissions and interrogatories of record on this appeal [R. 90-92]. Subsequently, after Engelhard's answer to the motion, Research filed a reply brief including the affidavit of Lawlor, an attorney of record for Research in the District Court and patent lawyer for Research for a number of years [R. 197]. Counter-affidavits were not filed by Engelhard because the Lawlor affidavit raised no issue of fact not clearly controverted by sworn statements of Engelhard in the record prior to the motion hearing. (F. R. C. P. 56 not requiring opposing affidavits.)

The District Court considered *only* four requests for admissions and answers thereto in addition to the affidavit of Lawlor in formulating its conclusion of non-infringement [R. 249]; also, the District Court directed its attention only to the issue of file wrapper estoppel [R. 249]. Furthermore, only one of these four answers was related to the limited issue now before this Court of the "free area" on the cathode [R. 22—No. 256].

The District Court did not consider the answers to requests for admissions Nos. 254, 255, 259, 260 [R. 83 through R. 86]; furthermore, the District Court did not consider answers to requests for admissions Nos. 60, 61, 62, 63, 64, 65, 68, 69, and 86 [R. 22-R. 25 and

R. 32]. *Each of these sworn answers by Engelhard specifically denies that the cathode of the accused analyzer was totally covered with electrolyte.* These sworn statements are a part of the record relied upon by Research in its motion for summary judgment [R. 91, Items 4 and 5]. The sworn answer to request for admission No. 60 [R. 22], for example, specifically states that the cathode of the accused device has a portion free of electrolyte (See Appendix).

Thus, the only portion of the record which formed a basis for District Court's conclusion was the answer to interrogatory No. 256 [R. 83] and the Lawlor affidavit.

Considering answer No. 256, the District Court did not consider that moisture characterizes every device of this type and will form a thin film on the part of the cathode which is free of bulk electrolyte, and that this thin film is electrolytically conducting to a slight extent such that it may also be and was technically termed an electrolyte [R. 23, Answer No. 62, line 29, Patent No. 2,992,170, column 5, lines 30-35 of said patent and Hersch patent, column 6, lines 35-36].

The Lawlor affidavit is ambiguous since it states the electrolyte covers, which may mean rises by capillary attraction to the uppermost part of the cathode, rather than "envelopes" as this Court recognizes to be the proper term (first full para. p. 6 of Court's decision).

Thus, the District Court's conclusion of "no genuine issue of fact" was based only upon a technically ambiguous answer to a request for admission and a technically ambiguous affidavit of opposing counsel submitted in a reply brief and did not consider the numerous sworn statements to the contrary by Engelhard *in the record.*

In considering the second ground of this petition for rehearing, it is believed that the District Court erred and should further have granted appellant a rehearing on the basis of United States Letters Patent No. 2,-992,170 which issued July 11, 1961, about three weeks after the hearing on the motion for summary judgment (June 19 and 20, 1961).

The patent clearly refers to a thin film of moisture covering the uppermost part of the cathode (Patent No. 2,992,170, column 5, lines 30-35) and to "menisci" on various portions of the cathode screen (Patent No. 2,-992,170, column 9, lines 66-69; column 10, line 2; also appellant's brief, pp. 25 and 26). Meniscuses are well known in the art and cannot form unless there is a junction or boundary between a wetted part and a non-wetted part of a body. Thus, if "menisci" exist, then non-wetted parts or "free areas" characterize the cathode [R. 23, No. 61 and 62].

Accordingly, it is respectfully requested of this Honorable Court that appellant be given an opportunity to have a rehearing on the basis of the record now before this Court or supplemented if permissible with other portions of the certified record and the record before the District Court, but not made a part of the printed record on appeal because of the limited issue of file wrapper estoppel.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: November 22, 1963.

WILLIAM J. ELLIOTT,
ELLIOTT & PASTORIZA,
Attorneys for Engelhard Industries, Inc., Appellant.

APPENDIX.

"*Statement No. 60.* No part of the external surface of the cathode used by the defendants in the accused analyzer structure is free of electrolyte during the time said structure is being used for its intended purpose of measuring oxygen in an oxygen-bearing gas.

Answer No. 60. This is denied; the silver screen cathode of defendants' device is closely patterned after the silver screen cathode of the device shown to defendants' employee, Mr. McNamara, at Bayonne, and which appears in Figs. 4 and 5 of the patent in suit. Both of these silver screen cathodes have areas which will be damp as a result of pre-humidification, *but both are free of the electrolyte* with which other portions of the cathodes are in contact." (Emphasis added) [R. 22, 23.]

See also Vol. 3187

NO. 17903

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK PAUL KOURKENE,

Appellant,

vs.

AMERICAN BBR, INC., a Pennsylvania corporation,

Appellee.

APPELLANT'S PETITION FOR REHEARING

LEO E. ARNOLD, JR.

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109 Geary Street
San Francisco, California

Attorneys for Appellant Jack Paul Kourkene

NO. 17903

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK PAUL KOURKENE,

Appellant,

vs.

AMERICAN BBR, INC., a Pennsylvania corporation,

Appellee.

APPELLANT'S PETITION FOR REHEARING

To the Honorable, Oliver D. Hamlin, Jr., Charles M. Merrill, Circuit Judges, United States Court of Appeals for the Ninth Circuit and the Honorable M. D. Crocker, United States District Judge.

Jack Paul Kourkene, Appellant, by his attorneys, respectfully petitions this court for a rehearing of the above entitled case in which this court rendered its decision on January 15, 1963, and in support thereof, presents the following reasons:

In reaching its conclusions herein that Appellee, American BBR, Inc., "was not doing business in California," we

respecfully submit that the court did not consider all of the relevant facts bearing on this issue, and, therefore, the decision is based on various conclusions which are contrary to the evidence presented. If all of the relevant facts are taken into consideration, it will be obvious that the Appellee is, in fact, "doing business in California," so as to be required to defend this action here.

It is asserted in the decision that Appellant's cause of action did not arise out of or result from any of the "few isolated activities on the part of Appellee in California." If we consider only the various activities of Appellee set forth in the opinion, we may agree that this conclusion reached by the court was correct. However, Appellant's claim against the Appellee is based on the fact that Appellee, as the agent of the Swiss defendants, entered into a contract with Ryerson, which contract arose directly out of and as a result of Appellant's activities in California. Although it may be true that Appellee is not responsible for all of the conduct of the Swiss defendants, such as the conspiracy and fraud counts set out in the Complaint, it is true, however, that if Appellant proves his claim for breach of contract, i. e., for his share of the royalties paid to Appellee by Ryerson, then Appellant is entitled to a judgment against Appellee, since Appellee is a party to the contract with Ryerson on behalf of the Swiss defendants. The effect, therefore, is that the activity of the Swiss defendants and of Appellant in

California becomes the activity of Appellee in California, and since Appellee receives the benefits of this activity, it must assume also, the obligations thereof. One of these obligations is to defend this action in California where the activity from which it benefited took place. Appellee has not and cannot deny that it has derived and is deriving a very valuable business benefit from the services rendered by Appellant in California, which gave rise to the license agreement between it and Ryerson.

The opinion also states that Ryerson sells the BBRV method solely for its own account to its own customers, without any direction or control by Appellee. The facts show however, that Appellee directly assists Ryerson in the application of the BBRV method by supplying Ryerson with an engineer and by training Ryerson's employees. Appellee is also protected in its agreement with Ryerson to see that Ryerson uses the method properly. Moreover, Ryerson's customers are also directly customers of Appellee, since Appellee receives absolutely no benefit from its agreement with Ryerson until a customer for the BBRV method is found and royalties are paid to Appellee only on the wire used in each individual project.

While it is true, as the decision states, that Appellee does not manufacture or distribute any product in California, it does have its product manufactured and distributed for it in California by Ryerson. Thus, Appellee's "contacts" with California exist one way or the other and for precisely the same purposes.

The differences are differences only in form and description. Appellee derives exactly the same, if not more, business advantage in California because of its arrangements with Ryerson.

The decision of the court does not at all consider the following facts:

All the relevant facts for the action took place in California, and, therefore, it will be more convenient for all parties to try the case here, because of the availability of evidence; Appellant is now and at the time that the cause of action arose, was a resident of California; there is no forum, except California, in which all of the defendants can actually be sued at one time, and, therefore, multiplicity of suits must result if it is not maintained here.

If the above referred to relevant facts are considered by the court and the erroneous conclusions thus corrected, a result contrary to that reached by the court would be required. Accordingly, we respectfully request this court to grant this Petition for Rehearing.

CERTIFICATE OF COUNSEL

The undersigned, attorney for Jack Paul Kourkene, Appellant, hereby certifies that the foregoing Petition is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

Respectfully submitted,

LEO E. ARNOLD, JR.
BARBAGELATA, ZIEF & CARMAZZI
109 Geary Street
San Francisco 8, California

Nos. 17,912, 17,913 and 17,914

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 17,912

SPRAY REFRIGERATION COMPANY, INC., a California corporation,
Appellant,

vs.

SEA SPRAY FISHING, INC., a California corporation,
Appellee.

No. 17,913

SPRAY REFRIGERATION COMPANY, INC., a California corporation,
Appellant,

vs.

VAGABOND FISHING, INC., a California corporation,
Appellee.

No. 17,914

SPRAY REFRIGERATION COMPANY, INC., a California corporation,
Appellant,

vs.

COURAGEOUS FISHING CORP., INC., a California corporation,
Appellee.

BRIEF FOR DEFENDANTS-APPELLEES.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Nos. 17,912, 17,913 and 17,914

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 17,912

SPRAY REFRIGERATION COMPANY, INC., a California corporation,
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No. 17,914

SPRAY REFRIGERATION COMPANY, INC., a California corporation,
Appellant,

vs.

COURAGEOUS FISHING CORP., INC., a California corporation,
Appellee.

BRIEF FOR DEFENDANTS-APPELLEES.

JURISDICTION.

The jurisdiction is correctly set forth on pages 4 and 5 of Appellant's Opening Brief.

STATEMENT OF THE CASE.

Appellant's Opening Brief has correctly and succinctly set forth the statement of the case on pages 2, 3 and 4. It should only be noted that the appellees pre-

sented no evidence relative to the validity or invalidity of the patent in suit. Instead, appellees established that they had not used the patented method and that they would not use such method even if they were given a free license. Accordingly, the District Court did not rule on validity.

SUMMARY OF ARGUMENT.

Appellees contend that the District Court did not err in failing to find the patent in suit valid since it was within the discretion of the District Court to rule or not rule on validity.

As to the issue of infringement, appellees contend that it was well established at the trial that the apparatus of the accused vessels could be operated in a non-infringing manner, *i.e.,* such apparatus could be satisfactorily operated without building up a reverse layer of ice on the coils. Additionally, it was conclusively established at the trial that the appellees did not want to build up a reserve layer of ice on the coils because of certain important disadvantages connected therewith. Finally, the evidence conclusively established that the operators of the accused vessels had no need to create reserve refrigeration by building up ice on the coils since they obtained such reserve by other (and more satisfactory) means.

The burden of proving infringement was upon the appellant. Appellant completely failed to sustain this burden.

ARGUMENT.

The Issue of Validity.

In this case the appellees presented no evidence relating to the validity or invalidity of the patent. The appellees were so certain that the fact of their non-infringement would be established that they felt it unnecessary to expend the considerable amount of money required for establishing validity. Inasmuch as appellees chose this course, a saving of the Court's time of from one to two days was accomplished. If appellant's contention is correct that under these circumstances a District Court must rule on validity, it would follow that the defendants in patent infringement actions would always be required to spend the time, money and effort required to prove invalidity. Moreover, the Court in each patent infringement case would be required to expend the time necessary for establishing patent validity or invalidity.

A C. A. 1 case in point is *Hale v. General Motors Corporation,* 147 F. 2d 383, 64 U. S. P. Q. 343 (1945). In the *Hale* case, the District Court had found non-infringement, but made no findings and reached no conclusions on the issue of patent validity. The appeal court stated:

> "Under these circumstances, and in view of the fact that at the trial below the principal emphasis was on the issue of infringement and the district court requested briefs and made findings on that

> issue only, we feel that even though we may have power to declare the plaintiff's patent invalid, in discretion we ought not to do so here. Hazeltine Corp. v. Crosley, 130 F.2d 344, 349 (54 USPQ 435, 439); Landis Machinery Co. v. Chaso Tool Co., Inc., 141 F. 2d 800, 805 (61 USPQ 164, 169-170)."

It should also be noted that the Supreme Court in *Altvater v. Freeman,* 319 U. S. 359, 363 said:

> "To hold a patent valid if it is not infringed is to decide a hypothetical case".

On the basis of the two decisions above, appellees submit that it was not error for the District Court here to not find the patent in suit valid since it was within the discretion of the District Court to rule or not to rule on validity.

THE ISSUE OF INFRINGEMENT.

I.

The Apparatus of the Accused Vessels Could Be Operated in a Manner That Does Not Infringe.

There is no doubt but that the apparatus of the accused vessels could be operated in a manner that would infringe the patent in suit, *i.e.,* to build up a reserve layer of ice on the coils. On the other hand, it is also true, as admitted by plaintiff's witnesses, that the apparatus of the accused vessels could be operated in such a manner *as to not infringe the patent* in suit, *i.e.,* without building up a reserve layer of ice. Thus, Malcolm L. Newell the inventor of the patent in suit testified as follows [R. 103]:

> "Q. In your opinion, would it be possible to operate the type of apparatus shown in your patent to satisfactorily freeze fish without building up a reserve layer of ice on the refrigerating coils? A. Certainly, it could be done."

Jack Kordich, a witness called by and on behalf of the plaintiff and an ex-engineer on the accused vessel VAGABOND, testified that when ice built up on the coils he removed it either by cutting down the refrigeration or adding salt to the circulating brine [R. 176]:

> "A. If you build up ice accidentally, say I am sleeping and I got the spray system on and I am sleeping, during the night, twelve hours, if I am in my bunk, I don't look in the hatch, and when

I look in there, I see ice, so right away I don't want that ice and I will stop the refrigeration. I will stop the refrigeration or add salt, one of the two".

Harry Zeirlein, called as a witness by and on behalf of the plaintiff, testified that he was an engineer on the vessels NAUTILUS and SOUTHERN EXPLORER equipped with spray refrigeration systems of the type shown in the patent in suit. When asked if such spray refrigeration apparatus could be used without building up a reserve layer of ice on the coils he admitted two means were available to prevent such ice buildup [R. 201]:

"Q. Is there any way you could cut down your refrigeration so as to prevent this building up of ice? A. Yes, you could. Without the back pressure valve, you could cut it down.

Q. You could anyway? A. Yes.

Q. And also, if you add salt to the brine, couldn't you prevent the forming of ice on the coils? A. Yes, you could."

Even plaintiff's expert witness, William L. Holladay, admitted [R. 378]:

"Q. Your testimony is, though, that if you add salt to the sea water, you can circulate the sea water against the coils without forming ice? A. If you add enough salt, yes, sir."

II.

The Operators of the Accused Vessels Did Not Wish to Build Up a Reserve of Ice on the Coils Because of Certain Inherent Disadvantages Connected Therewith.

Starting with plaintiff's witness Jack Kordich [R. 169, 170]:

> "Q. When do you add salt to your spray that you spray over the coils? A. Well, at first you work it different. Usually when it starts forming ice on the coil, if you got fish in the hatch and it starts forming ice on the coil, you put salt in to cut the ice, because you don't want no ice to form on the coils, because that might stop the refrigeration.
>
> The Court: You say you don't want any ice on the coils?
>
> The Witness: No, because that ice stops my refrigeration. I would rather have the cold water hit my pipes. The pipes is colder than the ice. Because if you put a fish on the coil, it will freeze a fish, and you put the fish against the ice and it won't freeze it."

Matthew Francievich, called as a witness by and on behalf of the plaintiff, and present engineer of the vessel SEA SPRAY, testified on this point [R. 188, 189]:

> "Q. Will you tell it why it is you don't want to build ice on the coils, Mr. Franicevich? A. In my knowledge, I think the water would get cold more rapidly than it would with ice."

Matt Simundich, master of the vessel SEA SPRAY, testified [R. 219, 220]:

> "Q. You say you instructed the engineer to stop building reserve ice, is that correct? A. Yes.
>
> Q. What were your reasons in so instructing him? A. We discussed it. I talked with people whom I considered competent, the man that had done the refrigeration work on our boat, and other engineers off other vessels, I talked to a number of them, and they all told me exactly the same thing, just opposite of what Mr. Newell would be telling me, you know, to build this ice.
>
> That if you have ice built up on your coils, a little bit, and you can get it up, okay, but if you have ice on a coil, you have insulated that coil, and the insulation does not allow the heat to be drawn out through the pipes of your mechanism, your refrigeration system, so what you are doing you are just insulating and you are cutting down your refrigeration."

John Stanovich, captain of the accused vessel VAGABOND, testified that he did not want to build up ice on the coils because the presence of such ice would reduce the fish-carrying capacity of his vessel [R. 248]:

> "Q. Have you ever experienced, after you started recirculating the brine, have you ever experienced this brine building up ice on the coils? A. If I see ice building up on the coils, I immediately tell the chief to add salt, if possible, or to discontinue that practice. I do not like to see ice on the coils in the main hatch.

Q. Have the fish been chilled, through, by the time you put in the new additional salt or brine? A. The water gets to about 32 or 31 degrees, something like that.

Q. Then they are chilled, aren't they? A. They are chilled. May I bring something else into this here, if I can, your Honor?

The Court: Go ahead.

The Witness: The reason we do this is because we have a small boat. We don't bring in too much fish and we don't make too much money. By doing this, I increase my capacity by at least 10 tons, and I figure there is 11 families on that boat and everybody makes a good living. That is why I do it."

Andrew Kuljis, Captain of the accused vessel COURAGEOUS corroborated Stanovich in stating that building ice on the coils reduced the fish-carrying capacity of a fishing vessel [R. 264]:

"Q. You didn't want him to build ice on the refrigeration coils, is that correct? A. Yes.

Q. Why did you tell him that? A. Well, I told him that because we had to carry more fish if we don't make ice."

The testimony of Stanovich and Kuljis was corroborated by Pete Andrich. Pete Andrich was formerly skipper of the fishing vessel SOUTHLAND. He has no interest in the outcome of this action and is certainly a disinterested witness. It should be noted that the SOUTHLAND was licensed under the patent in suit and actually paid royalties to plaintiff. Even

though the SOUTHLAND paid such royalties its skipper Pete Andrich did not want ice built up on the coils as will be apparent by his following testimony [R. 288, 289]:

"Q. All right. Now, in using this spray refrigeration system, did ice build up on these coils that went through the hold when you sprayed? A. Yes, ice did build up on the pipes, but that's something, we had so much refrigeration and the efficiency of the refrigeration with spraying the water over the pipes would build up the ice, which we didn't want, because that takes the place of fish. And we aren't interested in carrying ice. We are interested in carrying a capacity of fish, which is our pay load.

Q. Did you do anything to try to prevent this ice buildup? A. Yes. We turned what we called our overhead coils, part of the side coils off, and after, I believe the second or third trip, I did take off coils off at the bottom of the hatch, which were directly on the bottom. I took out what we call eight-rungs, which is approximately 34 feet in length. Each run, they are 34 feet in length, so I took out those coils to stop building up ice, because I was building up too much. And when I took those out, of course, we were using salt which, of course, cuts the ice. But we did have to put in more salt all the time to keep the ice out. But we did turn off all the top coils, and what we call the side coils to keep from building this ice up.

Q. Then if this ice would build up, you did whatever you could to get rid of this ice. Is that your testimony? A. Yes."

It should also be noted that Marko Radovcic a witness called by and on behalf of the plaintiff corroborated the testimony of John Stanovich, Andrew Kuljis and Pete Andrich that building up the reserve ice on the coils reduced the fish-carrying capacity of a fishing vessel. Radovcic was an ex-skipper of the accused vessel SEA SPRAY. He is now employed on another vessel and is therefore a disinterested witness. Radovcic's testimony was as follows [R. 119, 120]:

> "Q. You testified that you served on the JO ANN in 1957 and 1958. Were you instructed by Mr. Newell at that time as to how to run the JO ANN's refrigeration system so as to build up reserve ice on the coils? A. Well, I wasn't instructed. We talked a lot about it.
>
> Q. You talked to Mr. Newell about it? A. Yes.
>
> Q. Did you ever inform him as to your thoughts on the desirability of this building up ice? A. Yes. We talked about that also.
>
> Q. Did you tell him you thought he shouldn't build up ice on the coils? A. Yes. It was my opinion that we were losing cargo space from the ice."

The fact that the reserve ice would in fact occupy considerable cargo space was evidenced by Newell's testimony that the thickness of the ice on the coils approximated 12 inches [R. 32].

Antonio R. Montoya installed the spray refrigeration system on the accused vessel COURAGEOUS and was her ex-engineer. He is presently chief engineer aboard the fishing vessel WESTERN SKY and is a disinter-

ested witness. Montoya corroborated the testimony o Jack Kordich and Matt Simundich to the effect that th building up of ice on the coils would reduce the re frigerating efficiency of the system, as follows [R 317]:

"Q. Do you know Mr. Newell? A. Who?

Q. Mr. Newell, Mike Newell. A. Yes, I know him.

Q. Have you ever discussed refrigeration with Mr. Newell? A. He has come to my boat and he called me and called to my attention that if I built any ice on my coils, and I said, 'No, I don't want to build no ice on the coils, because it insulates my refrigeration from the fish.'"

III.

The Evidence Conclusively Established That the Operators of the Accused Vessels Had No Need to Create Reserve Refrigeration by Building Up Ice on the Coils Since They Obtained Such Reserve by Other (and More Satisfactory) Means.

In the case of the vessels SEA SPRAY and VAGABOND, the reserve refrigeration was created by prechilling water in the brine tanks. When a large quantity of fish were boarded in a short period of time this prechilled water was transferred into the fish-receiving hold so as to obtain initial chilling of the freshly-caught fish.

Thus, Jack Kordich, plaintiff's witness and an ex-engineer on the accused vessel VAGABOND testified as follows [R. 170, 171]:

"The Witness: I am talking now about the — we are talking about everything, and at first I

did, but I experimented and it was experimental — at first I had to build ice because I didn't know anything about it. It was the first boat I was on and I experimented. I found out they don't need no ice, and then I had brine tanks full of water. I got 3,000 4,000 gallons of water, and that water is down to 29, and as far as I am concerned, that is my reserve right there.

By Mr. Swain:

Q. Mr. Kordich, did I understand you to say you formed ice on the first boat or on the first trip? A. The first two trips I did. I was experimenting.

Q. The first two trips on the VAGABOND in 1960? A. Yes.

Q. Or 1961, rather. A. 1961, yes.

Q. You formed ice? A. I was experimenting so I was finding out I didn't need it.

Q. Why didn't you need it? A. Because I had a reserve in the brine tank, cold water."

The Kordich testimony was corroborated by John Stanovich, Captain of the accused vessel VAGABOND, Stanovich testifying as follows [R. 243]:

"Q. Did the VAGABOND utilize some form of reserve refrigeration? A. Yes. I was the one that — after I seen it operate by taking your cold water from the brine tank, the minute we had — the first catch we had when we went down, which to me seemed to work out a lot better than the ice was to take the fresh water out of that tank, add salt water, and chill this water down to as far as 28 degrees."

Stanovich further testified [R. 247]:

"The Witness: New brine from the brine tank is added. That water, like I told you, is around 27 degrees.

By Mr. Utecht:

Q. After you pump the cold brine from your brine is that what initially cools the fish? Is that the reserve refrigeration that you utilize on the VAGABOND? A. Definitely."

With respect to the accused vessel SEA SPRAY, her master Matt Simundich testified as follows [R. 223]:

"Q. Does the SEA SPRAY, or after the SEA SPRAY no longer built ice on these coils, did you provide a reserve of refrigeration? A. Oh, yes. As long as we have a tank that has water in it, be it fresh or be it brine, sea water, and the refrigeration coils are turned on in that tank, immediately, if the system is running, we turn the refrigeration on and slowly chill the water, and we have cold water. At exactly what temperature, I don't know, but the chief tries to keep it just where it doesn't start freezing."

The accused vessel COURAGEOUS creates a reserve refrigeration by virtue of its large mechanical refrigeration capacity. Because of such capacity it is not necessary for the COURAGEOUS to build reserve refrigeration by either building ice on the coils or by prechilling water in a brine tank. Thus, Antonio R. Montoya who installed the spray refrigeration system on the accused vessel COURAGEOUS testified that he had provided this vessel with sufficient mechanical refrigeration that no other reserve refrigeration was required [R. 333]:

"Q. When you designed the refrigeration system for the COURAGEOUS — A. That is correct.

Q. — did you feel you had enough refrigeration, 38 to 40 tons, that you didn't need any reserve refrigeration? A. Yes.

Mr. Utecht: That's all.

Recross-Examination

By Mr. Swain:

Q. Mr. Montoya, did you testify that your mechanical refrigeration is your reserve capacity? A. Tell me that again?

Q. Did you testify that the mechanical refrigeration on the COURAGEOUS was your reserve capacity? A. Yes. That is where the ice machines work hard and that is where you get your refrigeration from.

Q. Well, how can your ordinary capacity be a reserve capacity? A. In that it is just by either a reserve, it is just the capacity of the ice machine of making ice, or cooling the water from a certain degree to another degree, to a lower degree in temperature.

Mr. Swain: Thank you.

Redirect Examination

By Mr. Utecht:

Q. Is what you mean then, Mr. Montoya, that you have enough ice machines there that the ice machines themselves are the reserve capacity? A. That is correct. If not, then we have to put in some more ice machines in order to do that.

Mr. Utecht: All right."

It will be remembered that Malcolm Newell the inventor of the patent in suit installed his patented system on the fishing vessel JO ANN. The refrigeration capacity of the JO ANN was only 15 tons [R. 382, line 4], as compared with the 38 to 40 ton refrigeration capacity of the COURAGEOUS. It is no wonder that the COURAGEOUS did not require a reserve refrigeration by building up ice on its coils.

IV.

The Burden of Proving Infringement Was Upon the Plaintiff-Appellant and Appellant Completely Failed to Sustain This Burden.

It cannot be disputed but that the burden of proof of infringement rests upon the plaintiff. *Brooks et al. v. Jenkins et al.,* Fed. Cas. 1953; *Bene v. Jeantet,* 129 U. S. 638, 9 S. Ct. 428, 32 L. Ed. 803.

A. Evidence of Infringement by SEA SPRAY.

The only first-hand evidence presented by the appellant that ice was built up on the coils of the SEA SPRAY was that such build up took place on trips made before October 1959. The patent in suit did not issue until October 20, 1959, however. Accordingly, any building up of ice on the coils of the SEA SPRAY prior to that time would not amount to infringement.

The witnesses Franicevich and Simundich corroborated each other that after the trips prior to October 1959, when reserve ice was built up on the coils, this practice was discontinued because of the disadvantages inherent therewith.

The only testimony controverting that of Franicevich and Simundich was the testimony of plaintiff's expert

witness Holladay. Holladay's testimony consisted of an opinion that ice would have to be formed on the coils if the SEA SPRAY system were operated under certain conditions. Yet, it should be remembered that Holladay admitted that a system such as that utilized on the SEA SPRAY could be operated without building up ice on the coils. It should further be noted that Holladay admitted that he had never made a fishing trip on a vessel such as the accused SEA SPRAY [R. 390].

B. Evidence of Infringement by VAGABOND.

Defendant will stipulate that the system of the VAGABOND was initially operated in a manner to produce ice on the coils. This was done, however, only on one or two trips made in 1961. This building up of ice on the coils was in the nature of an experiment whereby the operators of the VAGABOND could make up their mind whether or not Newell's contentions regarding the advantages of building up ice were correct or incorrect. In fact, such experimentation took place at the suggestion of Newell, according to the testimony of Kordich [R. 242]:

> "Q. Prior to this first experimental work had you heard of the Newell refrigerating system? A. Yes.
>
> Q. Who had advised you as to that system? A. Well, I was — Mike had, and this happened —
>
> Q. By Mike, you mean whom? A. Mike Newell, Mr. Newell. At that time I was working on the WESTERN MONARCH. That was my first experience with a spray system.
>
> Q. And Mr. Newell had told you that it was desirable to build up ice on the refrigerating coils?

A. Yes. He told me it was a good practice to build up ice, and the skipper that was running the boat, I was on the wheel for him, and we both talked it over and thought it was a very good way of doing it at that time.

Q. After your first trial of the building up of reserve ice on the coils of the VAGABOND, did you continue to build up ice on subsequent trips? A. No."

The fact that the VAGABOND experimentally tried the Newell system at the urging of Newell was corroborated by Newell himself [R. 94]:

"Q. Mr. Newell, have you ever advised other boat owners or engineers how to practice your patented system? A. Yes, sir.

Q. In fact, you are quite proud of the system? A. Certainly, sir.

Q. Did you advise any of the defendants or their employees how to practice your patented system? A. I did,"

Appellee VAGABOND submits that under these circumstances this experimental use is *de minimis* so far as infringement is concerned. The only way in which the Newell system could be tested was under actual fishing conditions. It could hardly be expected that the fish caught and returned to port under these circumstances would be thrown away. It would therefore be unfair to hold this limited use of the patented system an infringement giving rise to the payment of damages to the appellant. Certainly, an injunction against further infringement would be an idle act in view of the conclusive testimony by the operators of the VAGA-

BOND that they would not use the patented system in view of its inherent disadvantages.

A case in support of the position of appellee VAGABOND is *Chesterfield v. United States* decided by the Court of Claims of the United States December 5, 1958; 159 Fed. Supp. 371, 116 U. S. P. Q. 445. In the *Chesterfield* case the Court held:

> "However, the evidence shows that a portion of the 422-19 alloy procured by the defendant was used only for testing and for experimental purposes, and there is no evidence that the remainder was used other than experimentally. Experimental use does not infringe. In a patent infringement case, District Judge Rifkind said:
>
> > The accused devices * * * can be eliminated from consideration for it affirmatively appeared without contradiction by the plaintiff, that defendant built that device only experimentally and that it has neither manufactured it for sale nor sold any. Dugan v. Lear Avia, Inc., 55 F. Supp. 223, 229, 61 USPQ 404, 410 (1944).
>
> This principle was applied earlier by District Judge Seymour, who said:
>
> > It is true that, if an infringing machine is made or used as an experiment merely, it does not infringe former patents. Bonsack Mach. Co. v. Underwood, 73 F. 206, 211 (1896).
>
> The claims in suit, if valid, are not infringed by defendant's experimental use of the accused 422-19 alloy."

Another decision to the same effect is *Dugan v. Lear Avia Inc.,* 55 Fed. Supp. 223, 61 U. S. P. Q. 405.

C. Evidence of Infringement by COURAGEOUS.

The only first-hand evidence produced by appellant to show infringement by the vessel COURAGEOUS was the testimony of the witness Aaboen. Aaboen was the engineer on the COURAGEOUS from Christmas 1960 until about 1961. Aaboen's testimony was directly controverted by that of the witnesses Kuljis, Banich, Montoya, Mihovil and Kusmanich. As has been set forth previously hereinabove, Kuljis the Captain of the COURAGEOUS and Montoya the Ex-engineer of the COURAGEOUS did not want to build ice because of the disadvantages inherent therewith. Additionally, the tremendous refrigeration capacity of the COURAGEOUS eliminated any need for reserve refrigeration created by building ice on the coils. The witnesses Banich, Mihovil and Kusmanich testified that they had never seen any ice formed on the coils during the time they served on the COURAGEOUS.

Appellee COURAGEOUS contends that the testimony of Aaboen cannot be believed in the face of the testimony of Kuljis, Banich, Montoya, Mihovil and Kusmanich, particularly since Aaboen was a biased witness. Thus, it will be noted that prior to the trial Aaboen was laid off from his employment on the COURAGEOUS. Thereafter he was employed as engineer on the JO ANN [R. 155, lines 12-20]. It should further be noted that the reason he was laid off from his employment on the COURAGEOUS was because of his inadequacy as an engineer. This was established by Aaboen at [R. 157]:

> "Q. While you were engineer on the COURAGEOUS this last year, was there any difficulty

with the equipment breaking down? A. Yes, sir. We had quite a lot of difficulty with the machinery, yes, sir.

Q. Were you in charge of that machinery and was it your job to maintain that machinery properly? A. Yes, sir."

Kuljis the captain of the COURAGEOUS testified on this point [R. 268]:

"Q. The last trip made by the COURAGEOUS this year, did you have an engineer along in addition to Mr. Aaboen? A. Yes.

Q. And what was his name? A. Warren Blodgett.

Q. Why did you think it was necessary to bring along two engineers? A. Well, I didn't have too much confidence in this engineer I had.

Q. Did you fire Mr. Aaboen? A. I told him I wasn't going to hire him for the next tuna season."

On this same point it should be noted that Newell who had been engineer on the JO ANN for several years stepped down in order that Aaboen could assume this position. Newell further testified that it was his intent to go back on the JO ANN but not as an engineer, only as a wheelman [R. 336-337]:

"By Mr. Utecht:

Q. Mr. Newell, are you the engineer on the JO ANN?

The Court: At the present time?

Mr. Utecht: Yes.

The Witness: No, sir.

By Mr. Utecht:

Q. Previously, you were engineer, is that correct? A. Yes, sir.

Q. And when did you stop that employment? A. I had stopped that employment just a few weeks ago as I had too much legal work to do in preparation for this trial, so that I could not faithfully fulfill my duties as an engineer and fulfill my obligations to the JO ANN.

Q. Are you going back on the JO ANN as engineer when this trial is over? A. I am not sure whether I am going to go back as engineer or as —my intent is to go back on the boat, yes, but I don't know whether it will be as an engineer.

Q. What other job would it be? A. I might go as wheelman."

In the light of the indisputed facts set forth above it would not appear logical that Aaboen could be other than biased when he testified that ice had been built up on the coils of the COURAGEOUS. Here was a man whose inadequacy as an engineer on the COURAGEOUS made it necessary to take along a second engineer on his last trip. Thereafter, he was laid off as engineer on the COURAGEOUS and almost immediately was made engineer on the JO ANN, Newell conveniently stepping down as engineer on the JO ANN in order that Aaboen could assume this position.

The only other testimony presented by appellant that ice was built up on the coils of the COURAGEOUS was the opinion testimony of appellant's expert witness

Holladay. As noted above, Holladay had admitted that a system such as that utilized on the COURAGEOUS could be operated without building up ice on the coils. Holladay further admited that he had never made a fishing trip on a vessel such as the accused.

Conclusion.

The law is clear that it was within the discretion of the District Court to rule or not rule on validity. Accordingly, it was not error for the Court to decline a ruling on the validity of the patent in suit.

With respect to infringement, the evidence is uncontroverted that the apparatus of the accused vessels could be operated in a non-infringing manner. It was also established that the appellees did not want to use the patented system because of the inherent disadvantages connected therewith. It was also established that the operators of the accused vessels had no need to create reserve refrigeration since they obtained such reserve by other and more satisfactory means.

The burden of proving infringement was upon the appellant. But, appellant completely failed to sustain this burden. Instead, the evidence was conclusive that ice was not built up on the coils on either the SEA SPRAY or the COURAGEOUS after the issuance of the patent in suit. It was admitted that the VAGABOND on one or two occasions experimentally used the patented system and thereafter discontinued such

use because of the disadvantages connected therewith. Such experimental use by the VAGABOND was at the urging of the inventor Newell and it would appear only equitable to hold that Newell had granted the VAGABOND an implied license to use his patented system in an experimental manner. In any event any infringement under these circumstances would be *de minimis*.

Dated, Long Beach, California, March 14, 1963.

Respectfully submitted,

FULWIDER, PATTON, RIEBER, LEE & UTECHT,
FRANCIS A. UTECHT,
Attorneys for Defendants-Appellees.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANCIS A. UTECHT,
Attorney for Defendants-Appellees.

Nos. 17,912, 17,913 and 17,914

IN THE

United States Court of Appeals

For the Ninth Circuit

PRAY REFRIGERATION COMPANY, INC., a California corporation, *Appellant,* vs. EA SPRAY FISHING, INC., a California corporation, *Appellee.*	No. 17,912
PRAY REFRIGERATION COMPANY, INC., a California corporation, *Appellant,* vs. AGABOND FISHING INC., a California corporation, *Appellee.*	No. 17,913
PRAY REFRIGERATION COMPANY, INC., a California corporation, *Appellant,* vs. OURAGEOUS FISHING CORP., INC., a California corporation, *Appellee.*	No. 17,914

APPELLANT'S REPLY BRIEF

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Nos. 17,912, 17,913 and 17,914

IN THE

United States Court of Appeals

For the Ninth Circuit

Spray Refrigeration Company, Inc., a California corporation, *Appellant,* vs. Sea Spray Fishing, Inc., a California corporation, *Appellee.*	No. 17,912
Spray Refrigeration Company, Inc., a California corporation, *Appellant,* vs. Vagabond Fishing Inc., a California corporation, *Appellee.*	No. 17,913
Spray Refrigeration Company, Inc., a California corporation, *Appellant,* vs. Courageous Fishing Corp., Inc., a California corporation, *Appellee.*	No. 17,914

APPELLANT'S REPLY BRIEF

A reading of the "Brief for Appellant" and the "Brief for Defendants-Appellees" shows the following to be the issues before the Court:

Did the Honorable United States District Judge err in not finding United States Letters Patent 2,909,040 valid and

Did plaintiff sustain its burden of proving infringement?

The Briefs indicate the parties are in agreement on the following matters:

The apparatus on all of the vessels is identical.

The invention of the patent in suit does not reside in the apparatus upon the several vessels but resides in the *use* of the apparatus.

The apparatus on each of the defendant vessels can be used in an infringing manner and infringement occurs when the parties operate the apparatus in such a manner as to build up a reserve layer of ice on the coils.

The same apparatus can be used in a noninfringing manner and infringement does not occur when the apparatus is used in such a manner that a reserve layer of ice is not built up on the coils.

Therefore, the question of infringement can be determined by this Court by a determination of whether or not the evidence shows that ice was built up on the coils.

THE VALIDITY OF THE PATENT IN SUIT.

The validity of the patent in suit was not challenged although invalidity was pleaded as a defense and numerous patents were cited in the Pre-Trial Order. The Examiner in charge of the application had available to

im all of the patents in the Patent Office and the pertinent rt relied upon by him is found listed at the end of the atent, Exhibit 1.

As we pointed out in our Opening Brief, the patent is resumptively valid and this presumption is buttressed y the evidence of utility as testified to by the inventor ewell and corroborated by the witnesses Holladay, Las-n and Zierlein.

Under these circumstances the patent should have been, nd should be, found to be valid.

INFRINGEMENT BY VAGABOND.

Certainly, plaintiff sustained its burden here because ppellee VAGABOND *admits* (pages 17 through 19 of Brief for Defendants-Appellees") that on two occasions operated its equipment in an infringing manner and so *fringed* Newell's patent. It seeks to excuse its infringe-ent by stating that the use was "experimental" and "de inimis".

Our opening Brief clearly and correctly sets forth the w that the use of the invention by VAGABOND was not xperimental in that it was not for the purpose of grati-ing philosophical tastes, or curiosity, or for mere amuse-ent. It was a use for profit and was a use in business. uch use is clearly an infringing use.

As the Honorable A. F. St. Sure stated in *Northill Co., c., et al. v. Danforth*, 51 F. Supp. 928, (modified on other rounds in 142 F. 2d 51):

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As the Honorable A. F. St. Sure stated in *Northill Co., c., et al. v. Danforth,* 51 F. Supp. 928, (modified on other rounds in 142 F. 2d 51):

"Defendant testified that he used the anchors fo experimental purposes since the reissue date of th Northill patent, but contends that such use does no constitute an infringement. It has been held that a experimental use for philosophical or amusement pur poses is not an infringement, but that where experi ments are made commercially, such experimentatio may be an infringement. 48 C.J. Sec. 496, p. 296. De fendant's experiments were evidently not made fo philosophical or amusement purposes but were mad in connection with his business as a manufacturer an salesman of anchors."

Moreover a single act of infringement is sufficient t warrant the issuance of an injunction and, this must b particularly so, when it is apparent that the apparatu may be used in an infringing manner at will and at an time the parties may wish to do so; even by acciden (Kordich, Tr. V. 3, p. 176). Such is the case at hand. I would work no hardship upon Defendant VAGABOND t be enjoined from operating its apparatus in an infringing manner.

Note Walker on Patents, Deller's Edition, Volume Three, pages 2132 and 2133:

"But the fact that the defendant has ceased to in fringe the patent, and says that he will not infringe it in the future, is no reason for refusing an injunc tion against him. (Citing cases). * * * If the answe asserts the right to make the alleged infringing de vices, a very strong express denial of an intentior to do so is necessary to operate as a disclaimer of the intention, and the evidence to sustain the denial must be very clear (Johnson v. Foos Mfg. Co., 141 Fed. 73, C.C.A. 6 (1905)), for whatever tort a man has once

committed, he is likely to commit again, unless restrained from so doing."

We therefore submit that infringement upon VAGABOND was not experimental and may and should be enjoined.

INFRINGEMENT BY COURAGEOUS.

The testimony of the Witness Aaboen is clear and to the effect that ice was formed upon the coils; hence, COURAGEOUS infringed. The other witnesses are interested parties who operate the vessel on a share basis.

Infringement having been proven, as we have shown in our opening Brief; further infringement should be enjoined. This is particularly so since the apparatus on this vessel, like the apparatus on VAGABOND, can be operated in an infringing manner at any time.

INFRINGEMENT BY SEA SPRAY.

Infringement by SEA SPRAY is clear. The operation of the refrigeration system at the pressures testified to by the witness Franicevich (Tr. V. 3, p. 181) would of necessity result in the formation of ice upon the coils. (See Holladay's testimony in our opening brief, p. 27).

CONCLUSION

It is respectfully submitted therefore that the patent i suit possesses utility, is presumed to be valid, and shoul have been, and should be, found to be valid.

It is further submitted that the burden of proof of in fringement has been sustained.

Infringement upon VAGABOND has been admitted; i was not experimental, and it is sufficient to support th issuance of an injunction.

Infringement upon SEA SPRAY is proven by the wit ness Aaboen.

Infringement upon COURAGEOUS is proven by th unrefuted testimony of the Engineer Franicevich.

The Judgment of the District Court should be reversed

Dated, San Francisco, California,
April 2, 1963.

Respectfully submitted,
FLEHR & SWAIN,
Attorneys for Appellant.

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In the

United States Court of Appeals

For the Ninth Circuit

PAUL LESSIG,
Plaintiff-Appellant,

vs.

TIDEWATER OIL COMPANY,
Defendant-Appellee.

Brief of Appellee Tidewater Oil Company

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No. 17924

In the

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Statement of the Case

This is an appeal by a plaintiff, Paul Lessig, from a judgment entered against him upon a jury verdict.

On November 15, 1955 (following a prior lease entered into in May, 1955), Lessig leased from Tidewater Oil Company a service station in San Francisco "subject to termination at the end of the first or any subsequent six (6) months period by either party." P. Ex. 5, para. 2.[1] Concurrently he entered into a "dealer contract" with Tidewater entitling him to buy from it his

1. The notation "P. Ex. ....." refers to plaintiff's exhibits, "C.T. ....." to the Clerk's transcript, "R. ....." to the report of oral proceedings, and "O.B. ....." to the Opening Brief of Appellant. All emphasis in quotations is supplied unless otherwise noted.

requirements of gasoline, motor oils and greases manufactured by it, so long as the lease continued, but not to exceed three years unless extended at Tidewater's option. P. Ex. 6, paras. 1, 2. In April, 1958 Lessig offered the keys to the station to Tidewater (R. 694, 695), and on the basis of the extremely poor performance of the station Tidewater exercised its right to terminate the lease and dealer contract as of May 15, 1958. P. Ex. 84.

Lessig then brought this action for damages, claiming that the lease was terminated because he would not resell gasoline at prices desired by Tidewater, and asserting that the termination therefore violated Sections 1 and 2 of the Sherman Act. To this claim he added the makeweight of two others, viz., that during the period of his occupancy he suffered damages (1) from an alleged "inability" to resell gasoline at his own prices, and (2) from an alleged "inability" to acquire tires, batteries and accessories ("TBA") from persons other than Tidewater. Complaint paras. 27(a), (b); C.T. 10.[2]

Lessig's attorney is the same counsel who represented Simpson in a similar suit before the same District Judge based on similar theories, in which this Court recently affirmed a summary judgment for the defendant. *Simpson v. Union Oil Company of California,* ..... F2d. ..... (9 Cir., Jan. 2, 1963), 1963 Trade Cases, para. 70,612. This case could well have been ended by summary judgment on the same principles as this Court affirmed in *Simpson's* case. Instead, the exceedingly patient District Court denied a motion for summary judgment (C.T. 69) and let the case go to jury trial where, for nine days, plaintiff put on his case. Avoiding as long as possible any evidence about *his own* relations with Tidewater, Lessig paraded other former Tidewater dealers to testify respecting wrongs which Tidewater had allegedly

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2. Lessig's claim was stated by Plaintiff's Pretrial Statement of Issues as follows: (C.T. 45):

"8. The amount of damages suffered by reason of
(a) The lease cancellation,
(b) The exclusive arrangement on TBAs,
(c) The inability of plaintiff to set his own retail price on a free and open basis."

done *them*. The Court permitted this type of evidence on the representation that it would be connected (R. 62, 63), commenting that this "cart-before-the-horse will eventually give us the horse in the form of Mr. Lessig." R. 451. But there was no such horse, because nothing of the kind alleged had ever happened to Lessig, as became apparent when he finally took the stand. R. 595. The result was, in the language of the court, "that much of the evidence which was admitted on a theory that it would be tied into similar treatment accorded the plaintiff, should not have been admitted and would not have been admitted had the extent of Lessig's complaint been explored by examination of Lessig prior to . . . the testimony given by the various fellow dealers" (R. 904) and that "material . . . was obviously thrown in for the purpose of prejudice." R. 905.

At the close of plaintiff's case, the facts were so clear that defendant rested without adducing further evidence. The ever-patient court then submitted the cause to the jury upon a set of instructions so favorable to plaintiff that, had it returned a verdict for him, reversal would be required. Nevertheless, the jury returned a verdict for defendant. It is from the consequent judgment that plaintiff appeals. C.T. 192, 193, R. 1048.

The issues on appeal

The only issues open to an appellant from a jury verdict are these: (1) that the evidence is insufficient to support the verdict, a pretty difficult position for an appellant in most cases;[3] (2) that evidence was (a) improperly received or (b) improperly rejected; or (3) that instructions were (a) improperly given or (b) improperly refused. Sometimes a desperate appellant adds, as here, that the trial judge committed misconduct.

Here, Lessig does not claim that any evidence was improperly received. He could hardly do so since all the evidence came in on his own case in chief.

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3. See *Standard Oil Co. of California v. Moore*, 251 F2d. 188, 198 et seq. (9 Cir.).

Nor does he openly claim that the evidence does not sustain the verdict. Instead his long brief merely adverts to the verdict (O.B. 8), then blandly proceeds for over 110 pages to ignore it, replete with statements unsupported by the record, and with plain misstatements thereof. Lessig's brief heaps up selected excerpts of testimony and ignores all contrary evidence, even stipulated facts. It repeatedly speaks of "uncontradicted" and "undisputed" facts which Lessig's own testimony shows to be imaginary.

We shall show: *first,* that this was a sham case, and that the evidence sustains the verdict; *second,* that no evidence was improperly rejected; *third,* that there was no error in giving or refusing instructions; and, *finally,* that the claim of misconduct by the trial court is nonsensical.

Discussion

I. THE EVIDENCE SUSTAINS THE VERDICT.

Despite the great provocation, in order to keep our brief at a minimum length we shall refrain from pointing out, line by line, the misstatements and irrelevancies of the opening brief and shall limit ourselves to stating the matters which not only support, but indeed compelled, the verdict.

A. On the Claim of Improper Termination of Lessig's Tenancy

The claim here is that Tidewater cancelled the lease because Lessig would not follow its "instructions" respecting retail prices for gasoline (O.B. 10) as a consequence of which "he was unable to retain possession of the premises . . . for the full term of his Dealer Agreement" (Complaint para. 27c, C.T. 10) and "he was unable to realize the 'goodwill' of the business he developed while operating such service station during which time he increased the gallonage of said station from approximately 9,000 gallons per month to approximately 15,000 gallons per month, to his injury and damage." Complaint, para. 27d, C.T. 10.

Even if Tidewater had terminated the lease for the reason claimed there would have been no violation of the Sherman Act

We do not argue that submission, however,[4] because the jury found that the lease was terminated for no such reason but because Lessig was such an incompetent operator that Tidewater was making no money.

The trial court submitted Lessig's theory to the jury. Thus it instructed (R. 1008):

> "Plaintiff in this case complains that the defendant cancelled his lease and dealer contract . . . because defendant was enforcing a resale price fixing arrangement which required him to abide by the resale prices fixed by the defendant."

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4. We mention the point only because we would not wish the Court, in the absence of any statement of our position, to assume that cancellation for the claimed reason would constitute an anti-trust violation. That question can await decision in a case where it directly arises. Our contention can be compactly summarized thus:

The cancellation of the lease was in conformity with the rights specified in it. The Sherman Act denounces certain *contracts, combinations* and *conspiracies* in restraint of trade. The cancellation of a lease according to its terms is not the formation of an agreement to do anything, or the creation of a business relationship, but the opposite. A seller may lawfully terminate relations with a customer for the reason that he does not maintain desired prices. *United States v. Parke Davis & Co.,* 362 U.S. 29, 45, 46. If the relationship, while it was in existence, amounted to a resale price maintenance agreement, the Sherman Act may have *thereby* been violated. *Ibid.* But *the termination* of the relationship does not do so. If the lease were cancelled as a result of concert with others (*Poller v. Columbia Broadcasting,* 368 U.S. 464; *Klor's v. Broadway-Hale Stores,* 359 U.S. 207), or if the lessor were a monopolist (*Eastman Kodak v. Southern Photo Co.,* 273 U.S. 359, 375), different questions would be presented. But there was neither claim nor evidence of anything like that here. Absent such factors, the cancellation of a dealership does not violate the Sherman Act, although motivated by conduct of the dealer which the supplier could not lawfully restrain by agreement. E.g., *Nelson Radio & Supply Co. v. Motorola,* 200 F2d. 911 (5 Cir.); *Hudson Sales Corp. v. Waldrip,* 211 F.2d 268 (5 Cir.), cert. den. 348 U.S. 821; *Alexander v. Texas Company,* 165 F. Supp. 53, 63 (W.D. La.) As succinctly stated in *McElhenney Co. v. Western Auto Supply Co.,* 269 F2d. 332, 337 (4 Cir.):

> "Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in damages *for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement.*"

By other instructions (see pp. 39-40 infra) the Court charged that such a resale price fixing arrangement would be unlawful, and further instructed that Tidewater could not utilize cancellation of leases to require adherence to its price directions. R. 1012.

The evidence showed a different story.

In May of 1955, Tidewater had an old service station, "SS 62," located at Twenty-Second and Irving Streets, San Francisco. Tidewater's deliveries of gasoline to this station since January 1, 1954 had averaged just under 10,000 gallons per month.[5] After preliminary discussions Lessig agreed to lease this station but only if Tidewater would modernize it. R. 783. Both parties shared the belief that rebuilding the station would double its gallonage. R. 783, 784; P. Ex. 87.

The lease executed in November, 1955 (P. Ex. 5) specified a rental of $67.34 per month, plus one cent for each gallon of gasoline delivered to the premises. Para. 3. Thus, unless Lessig sold volume, Tidewater's rental return on its investment in the premises would be minute. The station was rebuilt between August 14, 1955 and October 15, 1955 (R. 617) at a cost to Tidewater of $29,000. P. Ex. 86A, p. 2. As remodeled, it had additional gasoline pumps and driveways, the lubrication, wash rack, restroom and lighting facilities were better, and it was a bigger and better station in all respects. R. 753, 754.

Rebuilding caused an immediate spurt in the station's gallonage, on which the rent was based. In November, 1955, the first full month after the rebuilding was completed, Tidewater delivered 12,500 gallons. P. Ex. 106. This was an increase of only 25% in the gallonage and not the 100% anticipated. In the 27 months which ensued before Tidewater gave notice of cancellation, there was no further increase of any consequence. During 1956, Tidewater's deliveries of gasoline averaged 12,659 gallons per month, just 159 gallons per month more than the first full

5. P. Ex. 106 is stipulated (R. 855) to be a copy of a record maintained by Tidewater's District Manager showing Tidewater's deliveries of gasoline to SS 62, by months, for the eight-year period beginning January 1, 1954.

month after the rebuilding, and but a 27% increase over the volume of the old station. P. Ex. 106.

In April, 1957, Tidewater prepared an analysis of the profits it had realized during 1956 from the station. After taking into account all receipts by Tidewater from the station, i.e., all rents paid by Lessig and all profits realized on sales to him of gasoline, oils, greases, kerosene, solvent and TBA, *Tidewater's total profit for the whole of 1956 in this station in which it had just invested $29,000, was $30.38,* before taxes! P. Ex. 93. This financial disaster to Tidewater was explained to its District Manager by his subordinate in a writing dated April 23, *1957.* P. Ex. 87. He stated:

> "We were recently asked by your office to give reasons why subject service station has not increased its gallonage to the estimate since being rebuilt. . . .
>
> "The estimate of 20,000 gallons per month would seem a little high. . . . However, *with the right type of operator* this unit should attain its estimate.
>
> *"The present operator could be classified as a drifter.* He has had Shell, Standard and Richfield stations. He has somewhat of a negative attitude. He believes he is doing a good job, 13,000 or 14,000 gallons per month, and that the station will never do 20,000 gallons per month. During the most recent price war, it was difficult to get him to lower his prices to meet competition in the area even though he was receiving assistance. He was a factor in losing some gallonage. . . .
>
> * * * * * * *
>
> *"The necessary steps to our problem here would be to get a new operator. . . ."*

This appraisal of the situation, put in evidence by plaintiff himself, preceded, by almost one full year, the cancellation of Lessig's lease.

Tidewater waited patiently for improvement in the gallonage, but there was none. Deliveries in 1957 averaged only 12,923 gallons per month, a mere 2% increase over 1956. P. Ex. 106. Tidewater's profit at the station for the entire year 1957, includ-

ing its profits on all sales to Lessig, was a paltry $907 before taxes. D. Ex. B. Then, during the first three months of 1958, only 36,887 gallons were delivered (P. Ex. 106), an average of 12,296 gallons per month, i.e., *even less than the station had averaged for the immediately preceding 24 months.*

Early in April, 1958, C. R. Clark, Tidewater's District Manager, called at the station and had a conversation with Lessig. Lessig's brief makes not less than eight references to his version of this conversation[6] (e.g., O.B. 5, 10-12, 36, 51, 52, 82, 99, 112) but is entirely silent about its most significant aspect, viz., *Lessig offered Clark the keys to the service station.* R. 694, 695. Clark accepted this offer by sending, on April 11, 1958, the notice of cancellation authorized by the lease. P. Ex. 84. On May 15, 1958, Lessig left the station (R. 701) and surrendered whatever interest he had in it by turning over to Tidewater's representatives the keys he had previously offered Clark. R. 796.

Clark told Lessig the reason for the cancellation: "We expected 20,000 gallons out of the station and you have only been getting between twelve and thirteen thousand out of it". R. 699, 700. He wrote to an inquiring customer of Lessig (P. Ex. 86):

> "I would like to explain the situation briefly so that you may realize there there is nothing personal in any way about this change. In the first place we built a new service station approximately 2½ years ago at a considerable expenditure. Mr. Lessig took over this new station and it was anticipated that with proper operation and sufficient inventory it might be expected to considerably increase in volume over the obsolete station that was formerly there. This did not occur; in fact the gain in volume was so small as to be hardly noticeable. The matter therefore became one of strictly economics. . . . We think we are doing him a favor, because as the records show, for the past 2½ years neither of us are making any money"

To precisely the same effect are P. Ex. 86A and P. Ex. 86B.

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6. It was stipulated that Clark's physical condition precluded his attendance at the trial. R. 594.

Lessig was succeeded at the station on May 15, 1958 (R. 701) by one David L. Wells. R. 405. In contrast to Lessig, who had had prior experience operating service stations (R. 750) and who lived in the area where the station is located (R. 595), Wells had no previous experience and lived in a different part of town. R. 437, 438. Nevertheless, the gallonage of the station under Wells' operation *immediately increased.* It averaged *15,007* gallons per month during the period June 1, 1958 through December 31, 1958, the first seven full months of Wells' occupancy. P. Ex. 106. In 1959 the station averaged almost *16,000* gallons per month and in both 1960 and 1961 over *17,000* gallons per month. P. Ex. 106. In December 1959, September and December 1960, and March and June 1961, it exceeded *20,000* gallons per month. P. Ex. 106.

The jury was fully warranted in concluding that Lessig's lease was terminated because he was a poor operator, and that out of a decent business respect for its investment Tidewater had to find another operator. The jury was also warranted in concluding that one of the reasons Lessig made such a miserable showing in the sale of gasoline was that he tried to gouge the public by charging too much.

In the neighborhood of this station there were 18 others, all in business throughout the entire period involved—one Shell station, one Tidewater, one Standard, two Texaco, two Mohawk, one Union, two General Petroleum, two Rio Grande, three Chevron and three Richfield. R. 784-787. Often some of these stations undersold Lessig. P. Ex. 40, p. 13 et seq.; P. Ex. 83. In circumstances like this, Tidewater reduced its price to its dealers to enable them, if they wished, to be competitive. This was done by so-called "dealer aid," a system of price reduction in areas of low prices.[7] The amount of dealer aid in cents per gallon was deter-

7. Area price reductions are recognized as proper under the Robinson-Patman Act. *F.T.C. v. Sun Oil Co.,* ..... U.S. ....., 1963 Trade Cases, para. 70,620. The purpose of dealer aid is shown by the following testimony of one Cristoni, a former Tidewater dealer called as a witness by plaintiff:

mined by the prevailing retail prices being charged for gasoline in the dealer's neighborhood, but the granting of dealer aid to a dealer did not depend on what he charged, for he was free to charge what he wished. Thus a Tidewater official, called as a witness by plaintiff, described the system thus:

> "What we did was to have our salesmen observe the general price situation in a given area, and when the level of the prices of our own dealers and other competitors within a given area were at a certain level, then it was our opinion that this was the general price and as a consequence we gave dealer aid to all dealers in that area in order that they would be in a position, *if they desired,* to meet such competition, whether it was up or down." (R. 532)

* * * * * * *

> "Q. Your aid was determined on what the retail price was *in a given area,* is that correct?
>
> A. Yes, it was, Mr. Keith." (R. 535)

* * * * * * *

> "Q. . . . the purpose of dealer aid was to reduce the price of gasoline to you, was it not?
>
> A. Yes.
>
> Q. So as to make it possible for you to continue in business?
>
> A. Yes." (R. 78)

Again:

> "The Court: Mr. Cristoni, from what you have said I gather . . . that the meaning of dealer aid as intended by Tidewater was to allow the dealer receiving it to meet competition which he could not meet if he were required to take the reduction out of his own pocket?
>
> The Witness: Yes." (R. 58, 59)

* * * * * * *

> "The Court: I want to ask the witness one question. Suppose in your business a Standard station or a Union station or one of the other oil company stations across the street from your place drops the price of gasoline by, say, 5 cents a gallon below the previous price, and there were no such thing as dealer aid and [Tidewater] Associated just said, 'You're an independent dealer; you bought the gasoline; either drop your price or remain the same; that's your problem.' What would happen?
>
> The Witness: Well, I would try it, and then most likely get out.
>
> The Court: Get out of what?
>
> The Witness: Sell my business." (R. 76)

"We would observe the retail prices *in a given area.* We would determine that in order for our dealers to become competitive they would have to be given dealer aid of a certain amount in order to guarantee them a certain margin of profit. Then we would give the dealer aid, *after which it was entirely up to them the price at which they sold gasoline.*" (R. 538)

* * * * * * *

"*He could charge, Mr. Keith, whatever price he desired to charge. The dealer aid that we gave had no relation to what he could or could not do with respect to his selling price. This is entirely up to the dealer.* Our aid was based on a situation to give him a guarantee that *if* he met the other dealers in the area that he would not make less than that amount." (R. 553-554)

* * * * * * *

"Q. And 6-1 was used when you came out with a form or schedule around November 1957 which calculated a certain amount of dealer assistance *to be based upon retail prices charged by the dealer,* would it not, Mr. Pease?

A. I remember this chart and the amount of dealer aid was based upon what we found to be *the price situation by dealers generally within the area.* Then we granted dealer [aid] based upon this chart, *but the dealer still had the right to sell at whatever price he wanted to sell gasoline for.*" R. 555.

Lessig would take the dealer aid but not lower his prices to meet competition. For example, on August 30, 1956 Lessig was charging the public 31.8 cents per gallon for "regular" gasoline and 35.3 cents per gallon for "ethyl." P. Ex. 83.[8] When a survey of the neighborhood showed that other stations were charging substantially less, dealer aid of ½ cent per gallon on "regular" and 1 cent per gallon on "ethyl" was extended effective from August 31 to September 20, 1956. P. Ex. 40, p. 13. Another survey then showed that the neighborhood price level was even lower, and Lessig's dealer aid was increased to 1½ cents on

8. It is stipulated that this exhibit sets forth the prices Lessig charged for gasoline. R. 642-643.

"regular" and 2 cents on "ethyl." P. Ex. 40, p. 14. This continued from September 20 through October 24, 1956. Another survey then revealing a further decline in the neighborhood price level, Lessig's aid was again increased from October 25 to November 29, 1956 to 2½ cents on "regular" and 3 cents on "ethyl." P. Ex. 40, p. 15. The total dealer aid given Lessig for this three-month period was $753.00. P. Ex. 77, pages 6-11.

Lessig, however, did not lower his retail prices until *November 7, 1956.* P. Ex. 83. Although dealer aid began August 31, was increased September 20, and was increased again October 25, Lessig did not reduce his retail prices for 68 days. Then two weeks later, on November 21, he increased his "ethyl" price (P. Ex. 83), and on November 23 his price on both grades (Ibid.), although there was on those dates no reduction of dealer aid.

Lessig apparently preferred a high profit per gallon and small volume. The jury was warranted in concluding that this method of gouging the consumer accounted for the miserable volume he sold, and that whatever the reason for his poor volume, Tidewater cancelled the lease because Lessig was selling insufficient quantities of gasoline.

The jury verdict thus disposes of Lessig's main claim.

B. On the Makeweight Claims.

1. THE CLAIM THAT LESSIG WAS "UNABLE" TO CHARGE THE PRICES HE WANTED.

From the claim that Tidewater cancelled the lease because he in fact charged prices of his own determination, Lessig shifts to the diametrically opposite claim. He claims that Tidewater "unlawfully controlled" his retail prices for gasoline, as a consequence of which "he was unable to fix and establish his own retail price for the sale of gasoline to his injury and damage" (Complaint, para. 27a, C.T. 10), or as stated in his brief: "Appellant also seeks damages for his inability to sell gasoline at market prices of his own judgment during the period 1955 to 1958 as a result of Tidewater's unlawful control of his prices." O.B. 2.

On this claim, Tidewater was entitled to judgment as a matter of law, under the opinion of this Court affirming a summary judgment for the defendant in *Simpson v. Union Oil Company of California,* ..... F.2d ..... (9 Cir.), 1963 Trade Cas., para. 70,612. There plaintiff, a service station dealer, entered into a written contract with the defendant Union, his lessor-supplier, under which he expressly agreed to charge for gasoline the prices specified by Union.[9] Lessig's attorney and Simpson's being the same, Simpson's claim of damages was identical to the claim of Lessig now under discussion. This Court said (1963 Trade Cases at p. 77,507):

> "Simpson alleges that he was 'unable' to fix the price of gasoline from May 1956 to March 1958. The undisputed facts show he did in fact exercise the power or privilege of fixing the prices of gasoline from March 1958 to May 22, 1958. * * *
>
> "The immediate assumption one makes is that he could have pursued this course of action earlier. His action in March 1958 demonstrates that he was not 'unable' to fix prices on gasoline."
>
> * * *
>
> "[w]hen his claim is based on an alleged *inability* to change the situation and his own actions show this ability we think his claim fails." (Emphasis in the original).

But the right to judgment as a matter of law need not be discussed further, because the jury's verdict found that Lessig did set his own prices and that he was not "controlled" by Tidewater. We need review only enough of the evidence to show that the verdict is sustained.

First, the lease itself provided (P. Ex. 5, para. 10):

> "5. *Lessee may conduct Lessee's business on said premises as Lessee sees fit,* and none of the provisions of this Lease shall be construed as reserving to Lessor any right to exercise any control or management over the business or operations of Lessee. . . ."

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9. Since that was a consignment agreement, its legality was on a different plane from a resale price agreement, if there had been one here. This Court found it unnecessary in *Simpson* to pass on any question of legality.

and

> "10. . . . . This Lease embodies the entire understanding of the parties hereto, and there are no further agreements or understandings, written or oral, in effect between the parties hereto relating to the subject matter hereof; . . . ."[10]

10. The first lease, that of May 15, 1955, contained identical provisions. P. Ex. 2C, paras. 5, 10.

Lessig's claim was, of course, an attempt to impeach this agreement, the terms of which are themselves evidence sufficient to sustain the verdict.

Beyond that, the evidence dehors the agreement was overwhelming. Lessig gave no testimony whatever that he had ever agreed with Tidewater to charge gasoline prices desired by it. And, on the contrary, his own testimony showed that he set his prices *not* on the basis of any conversations with Tidewater personnel, but on what was being done at three stations he considered to be his competitors, *as determined by himself*. He testified that he had conversations from time to time with Tidewater personnel respecting his retail gasoline prices. His versions of these conversations varied and, depending on which version one accepts, Tidewater personnel merely suggested lower retail prices to him (R. 792-793),[11] or advised him that "the Tidewater policy at the present time would be to drop the present price of gasoline" (R. 682) or "told" him to lower the price. R. 790. But Lessig's version as to how he *reacted* to these communications remained constant. *He simply rejected them*. There were "five or six" occasions (R. 683) when Mr. Finn of Tidewater allegedly told Lessig that it would be Tidewater's policy to drop the present price. R. 682. And (R. 683):

> "Q. What did you say, sir?
> A. I told him no."

11. This was deposition testimony, abandoned at the trial.

Nichols and Thompson of Tidewater allegedly came to the station with a price sign they asked Lessig to post. And (R. 684):

"Q. Then what did you say, sir?

A. My answer to Mr. Nichols was, I would rather give you my right arm than put this sign up."

Coleville of Tidewater allegedly came to the station and asked Lessig why he was not passing his dealer aid ("subsidy") to his customers. And (R. 685):

"Q. What did you say, sir?

A. I said, 'What subsidy . . . I have nothing on paper to show that I am being subsidized.' "

Lessig introduced four graphs in evidence. P. Ex. 79-82. The broken lines represented the tankwagon price to Lessig, plus one cent rent (R. 635-636, 639), taken from his delivery tickets (R. 637), and the solid lines represent Lessig's own retail prices charged by him to the public. R. 641.

"Q. From what source did you take those prices, Mr. Lessig?

A. *From my competition.*" (R. 641).

This subject was further explored as follows:

"Q. Whenever Mr. Finn spoke to you about lowering your price, your retail price, whether or not you did so depended on whether or not your competitors on Irving Street were lower than you were?

A. Yes, sir.

Q. That's right. And how did you find out whether they were lower or not?

A. I would make a survey of the neighborhood.

Q. If *you* concluded from your survey that your competitors were below you, you lowered your price?

A. Yes, sir.

Q. And if *you* concluded that your competitors were not below you, you did not lower your price?

A. That's right.

Q. Now, these competitors we are talking about are specifically this Richfield station (indicating), this GP station, and this Chevron station, right? (Indicating)"

* * * * * * *

". . . those three stations . . . are the people you considered to be your competitors?

A. Yes, sir.

Q. And these stations, these three stations, were the test in your mind whether you were going to lower the price?

A. Yes, sir." (R. 794-795)

* * * * * * *

"Q. Now, when these three stations, the GP station, the Richfield station and the Chevron station, went up you went up?

A. I believe that was the policy, yes, sir.

Q. You mean *your* policy?

A. Yes, sir.

Q. *You* made that determination?

A. Yes, sir." (R. 796)

How this policy worked in practice is shown, for example, by this (R. 681):

"A. Mr. Weaver [a Tidewater representative] said that my competitor at Twenty-Fifth and Irving and at Twenty-Sixth and Irving had a posted price of 29.9 for regular and 33.4 for premium.

Q. What did you say, sir?

A. I told him I would go down and look."

Lessig's brief concedes that "it was his policy to establish his own prices." O.B. 31. The evidence more than sustained the jury's conclusion that this is exactly what he did. Indeed, Lessig's claim that his prices were "controlled" is essentially based on an argument that "dealer aid," the reduction by Tidewater of its price to dealers in times of price wars, was contingent upon the dealer charging a price desired by Tidewater. Whatever would be the legal significance if this had been so, the evidence amply sustains the conclusion of the verdict that it was not so. The subject is reviewed at pages 10-12, *supra*. Lessig's argument on the subject is an effort to confound the computation of the amount of dealer aid on the basis of prevailing price levels with the granting or withholding of dealer aid based on the retail price

actually charged by the dealer receiving aid. The jury was not led into this confusion and accepted the fact that these were two entirely separate things.

2. THE CLAIM THAT LESSIG WAS "UNABLE" TO BUY TBA FROM ANYONE BUT TIDEWATER.

Lessig's second makeweight claim is that he was "forced" to enter into an agreement with Tidewater to buy all his TBA from it, as a consequence of which "he was unable to purchase and sell for resale the automotive accessories distributed by others to his injury and damage." Complaint, para. 27b, C.T. 10.

Here, as in the case of the first makeweight claim, Tidewater was entitled to judgment as a matter of law under the principles stated in *Simpson v. Union Oil Company,* ..... F.2d ..... (9 Cir.), 1963 Trade Cases, para. 70,612. But we need not dwell on that point because the evidence overwhelmingly sustains the jury verdict that there was no agreement and no compulsion, and that Lessig bought what he wanted, when he wanted, from whom he wanted.

There was, of course, no written agreement that Lessig buy TBA from Tidewater. The written lease, as noted (*supra,* p. 13), provided that he could conduct his business as he pleased, and that there were no other agreements. The dealer contract related to the purchase and sale of *petroleum products,* and had nothing to do with TBA.[12]

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12. The dealer contract did not even require Lessig to buy petroleum products from Tidewater. It merely specified that he would buy from it his requirements of its "Flying A" gasolines and "Veedol" and "Tydol" motor oils. P. Ex. 6, para. 2. To the extent he chose to purchase these products manufactured by Tidewater he was to buy them directly from Tidewater, and not from others to whom Tidewater sold, as, for example, other service station dealers, petroleum distributors, contractors, etc. (R. 227, 228). But he was free to buy similar products from anyone else. As in the case of the lease, the dealer contract specified that it contained the entire agreement between the parties. Para. 11.

Lessig's brief (O.B. 94) cites the testimony of Mr. Brunn. What Mr. Brunn said was this (R. 150, 151):

The evidence respecting Lessig's TBA purchases is undisputed. During his seven months in the station in 1955, Lessig's purchases of TBA from all suppliers and sources totalled $2,458.71. P. Ex. 89.[13] During the same seven-month period, his purchases of TBA *from Tidewater* totalled only $1,265.00. P. Ex. 95.[14] That is, during 1955 Lessig bought only *51%* of his TBA from Tidewater. In the calendar year 1956, Lessig's total purchases of TBA were $5,319.82 (P. Ex. 90),[15] of which $1,814.00, or only *34%* was purchased from Tidewater (P. Ex. 95), and the remaining *66%* from others. During 1957, Lessig's TBA purchases totalled $6,732.03 (P. Ex. 91),[16] of which $2,537.00, or only *38%,* was bought from Tidewater. P. Ex. 95. During the first four months of 1958, Lessig's TBA purchases totalled $1,822.48 (P.

"Q. To all those classifications you had a products form which required a dealer to buy his approximate requirements of petroleum from Tidewater; is that correct?

A. *No, no.*"

* * * * * * *

"The Court: If the witness thinks he can answer that question with reasonable clarity, he may do so. If he has an objection to it, why, he can say so.

The Witness: No, I have no objection to answering it. *This contract does not provide that the dealer has to buy these quantities* . . . all you have to do is read it."

13. This exhibit includes Lessig's profit and loss statements for 1955. Under the heading "Cost of Sales," subheading "Purchases," these statements separately state his purchases of (1) gasoline, (2) oil and oil products, and (3) TBA. For the latter the figures are: three months ended August 31, 1955: $1,105.84; September, 1955: $172.54; October, 1955: $128.05; November, 1955: $648.94; December, 1955: $403.34. Total: $2,458.71.

14. It is stipulated that this exhibit accurately reflects Lessig's TBA purchases from Tidewater, taken directly from Tidewater's records. R. 720-721.

15. See the first page of this exhibit, Lessig's own profit and loss statement for the year ending December 31, 1956, under the heading "Cost of Sales," subheading "Purchases."

16. See the second page of this exhibit, Lessig's own profit and loss statement for the year ended December 31, 1957, under the heading "Cost of Sales," subheading "Purchases."

Ex. 92)[17] of which $948.00, or only *52%,* was bought from Tidewater. P. Ex. 95. This is the evidence which Lessig's brief represents to this Court as showing that he bought "small amounts" from "outside sources." O.B. 95.

The basis of Lessig's claim of an agreement between the parties respecting TBA was an alleged conversation between him and one Finn, a Tidewater employee, when Lessig took over the station. Although Lessig claimed to remember this seven-year old conversation word for word (R. 781), his testimony of what Finn is supposed to have said to him and he to Finn in reply comes in so many different versions that from that fact alone the jury could disbelieve him. Finn was supposed to have said, diversly, that Lessig would "have to" buy from Tidewater all his *tires* (R. 800-801), or all his *TBA* (R. 780), or his TBA, but nothing was said about amount (R. 677), or all his TBA *and* oil and oil products. R. 606.[18] At his deposition, Lessig testified that he said *nothing* to Finn in reply and that he "thought the man had a lot of nerve." R. 781-782. At the trial, this testimony was abandoned, and the substituted testimony was, variously, that Lessig said "yes, sir" (R. 606) or "O.K." (R. 781) or that he said " 'O.K.' or 'yes, sir' *or something of that sort.*" R. 782. The jury was obviously at liberty to reject any part or all of this testimony (*Standard Oil Company of California v. Moore,* 251 F.2d 188, 198 (9 Cir.)) and to conclude from Lessig's conduct alone that there was no exclusive dealing agreement at all.

As shown above, Lessig did not buy all, or anything close to all, his TBA from Tidewater. During his occupancy of the station his purchases of TBA totalled $16,333.04, of which only $6,564.00 or *40%* were purchases from Tidewater. As might be expected

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17. This exhibit includes Lessig's profit and loss statements for 1958. Under the heading "Cost of Sales," subheading "Purchases," appear the following for TBA: January, 1958: $514.00; February, 1958: $555.29; March, 1958: $342.67; April, 1958: $410.52. Total: $1,822.48.

18. To which Lessig's brief adds yet a fifth version, unsupported by the record, that he was told that he would "have to" buy "all of his TBAs *and gasoline* and oil" from Tidewater. O.B. 31.

from these figures, Lessig was buying TBA from numerous suppliers other than Tidewater, the names of *twenty* of whom, together with Lessig's evasive testimony respecting the extent of his dealings with them, are found at R. 759-773. Indeed, his invoices reflecting purchases of TBA from persons other than Tidewater, which Lessig claimed never to have analyzed (R. 769, 770), formed a pile six or seven inches deep. R. 759.

Recognizing his inability to show an exclusive TBA agreement between *himself* and Tidewater, Lessig sought to show such agreement between Tidewater and *other* Tidewater dealers. Had the evidence showed such an agreement with others it would have been no evidence of an agreement with Lessig. Certainly it would not have compelled the jury to find the existence of an agreement between Lessig and Tidewater. But the effort to show an agreement between Tidewater and the other dealers was also a failure.

Lessig summoned as witnesses two persons in the business of calling on service stations to sell the same type of merchandise as that sold by Tidewater. Irving Auto Supply, described by Lessig as "an independent automotive parts equipment and supply business which serves the area" (O.B. 78, 79), maintained a sales force for the purpose (R. 2, 3) and supplied the Tidewater dealers (R. 23, 24) including Lessig. R. 31. Allan Squires, a salesman for Pennzoil Company, who called on all service stations (R. 95), was able to sell Pennzoil to "a substantial number" of Tidewater dealers who took "normal quantities," i.e., "what they wanted." R. 96. Lessig bought Pennzoil. R. 100, P. Ex. 30.[19] In addition, the "candy wagons"[20] called regularly in the area,

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19. Pennzoil is motor oil, not TBA, and is therefore outside the TBA damage claim. We advert to this product because in one of Lessig's versions of the alleged conversation with Finn, Finn is supposed to have told Lessig that he "had to" buy all his oil from Tidewater.

20. A "candy wagon" is "an accessory house on wheels." R. 760. As explained by Mr. Cristoni, a former dealer, "He has all these accessories in his truck . . . so he comes around and you just buy anything you need off of him." R. 85.

and Lessig did business with them. R. 760-762, 768. Even a former Tidewater dealer, John Ely, who plainly had a grudge against Tidewater, testified that he was told by Tidewater's representative only "that they *would like* to see me buy all my TBAs through the Tidewater supply house." R. 471. This is not the language of agreement, "coerced" or otherwise.

Tidewater's former Division Marketing Manager testified as follows (R. 268, 269):

> "Q. Do you know whether or not the Tidewater dealer at the time he is checked into a Tidewater station is told that he is to get his merchandise from the Tidewater warehouse or the designated consignee Mr. Brunn?
>
> A. No; he isn't told that."
>
> * * * * * * *
>
> "Q. He is not told that, what is he told?
>
> A. He is told one is available from the Tidewater warehouse and he is given reasons why it would be economic for him to do so. . . ."

It is characteristic of his disregard for the record that Lessig describes this as "undisputed evidence" that "Tidewater told the dealer upon obtaining a lease that he was to obtain his automotive accessories from the Tidewater warehouse." O.B. 26.

Another fact warranting the jury's verdict is that Tidewater's method of merchandising TBA was inconsistent with the notion that any dealer was obliged to buy. Prizes, discounts, credit plans and free merchandise were offered in profusion.[21] By way of a single example, if a dealer bought tires from Tidewater under the "Spring Dating Program" he received, in addition to his regular discounts off the dealer price sheet, further discounts ranging up to 7%, and in addition obtained deferred payment terms, without interest, under which the total price was payable in three equal installments 90, 120 and 150 days after delivery.

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21. D. Ex. A is a group of TBA circulars sent to Tidewater dealers reflecting special incentive promotions. R. 366-369. In addition to these special promotions, regular discounts off the dealer price sheets were extended. E.g., R. 344-348, 388.

R. 348-350. In addition, all TBA merchandise bought by a dealer from Tidewater was returnable by the dealer either for cash or for credit at his full cost. R. 387, 388. Lessig himself returned such merchandise.[22] How absurd it would have been for Tidewater to extend these discounts and privileges as sales persuasion to dealers to patronize Tidewater if they were under compulsion to purchase by exclusive dealing agreements.

The best summary of this aspect of the case is found in a single answer of Lessig (R. 787-788):

> "Q. Is it fair to summarize this TBA situation, Mr. Lessig, by saying that you tried to give Tidewater all the breaks you could?
>
> A. Yes, sir."

This is not the language of a man "forced" to buy all his TBA under an exclusive dealing arrangement, but the language of a man dispensing favors.

C. On Lack of Any Damages.

Not only was the jury warranted in finding no violation of law, but the evidence also sustains its verdict that Lessig suffered no damages.

We need not here rely on the settled distinction between the quantum of evidence a plaintiff must adduce in an antitrust case to show the *fact* of damage and the lesser quantum needed to go to the jury on *amount* of damage. See *Flintkote Company v. Lysfjord,* 246 F.2d 368, 392 (9 Cir.), cert. den. 355 U.S. 835. If we were here on a summary judgment or on a directed verdict that would be a relevant matter.[23] Here the trial court gave the issue

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22. P. Ex. 78 is a Tidewater record showing cumulatively, by months, Lessig's TBA purchases. Reference to the form dated July, 1957 shows eight batteries bought through that month. The August, 1957 form shows by a circled numeral one, the return of a battery, reducing cumulativ purchases to seven. The same forms show another battery returned in October, 1957 and two returned in December, 1957.

23. The trial court denied Tidewater's motion for a summary judgment (C.T. 69) and for a directed verdict. R. 906, 907, 913.

to the jury, and its verdict necessarily found that no damage was sustained at all.

1. LACK OF DAMAGES RESULTING FROM CANCELLATION OF THE LEASE.

Lessig claimed damages on the assumption that he had a term expiring November 14, *1960.* But he did not have. By its provisions, the lease was terminable on May 15, 1958, when it was cancelled. The dealer contract (P. Ex. 6) expired November 14, *1958,* or earlier if the lease ended earlier, and the extension to November 14, 1960 was to be only at *Tidewater's* option, not Lessig's.[24] But aside from these facts, the jury had before it the following evidence.

During his occupancy of the station, Lessig's profits averaged $284.33 per month. P. Ex. 107; R. 863.[25] His own witness, Dr. Vance, testified that in his opinion if Lessig had remained at the station he would earn no more. R. 862-863. He left the station May 15, 1958 (R. 701), immediately obtained employment from one Nelson, to which he could go as soon as he wished (R. 757), and he actually went to work at the end of May. R. 755. For the seven months of 1958 that he worked for Nelson he was paid $2,550 (R. 757),[26] an average of *$364.30* per month, being $80 per month *more* than he had made at the station. C. R. Clark's prediction that in cancelling the lease Tidewater was doing Lessig a favor was therefore accurate (see p. 8 *supra.*)

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24. The dealer contract provided (P. Ex. 6):

"1. TERM. The period of this Agreement shall be from the 15th day of November, 1955, to the 14th day of November *1958,* Seller [i.e. *Tidewater*] to have the option to extend said period to November 14th, 1960. ... If Dealer occupies the above premises under a lease from Seller, then in that event, notwithstanding anything herein to the contrary, *this contract shall terminate automatically upon any termination of said lease.*"

25. This figure is readily derivable by totalling the annual profits appearing in P. Exs. 89-92 and dividing the total by the number of months of Lessig's occupancy.

26. And see D. Ex. C, a copy of Lessig's federal income tax return for 1958.

If these facts did not compel, they certainly warranted the jury in finding that Lessig could make as much or more elsewhere than in running the Tidewater station and therefore suffered no monetary damage.

2. LACK OF DAMAGES FROM THE MAKEWEIGHT CLAIMS.

(a). From Alleged "Inability" to Determine His Own Gasoline Prices.

The profit one makes on the sales of goods depends not only on the selling price but on the volume of sales. Higher price may mean lower volume, and therefore either no greater profit or even less. Lessig's own testimony is that he watched the prices of three competitors and charged no more than they charged. The evidence showed that he often charged more than other stations in the neighborhood, and his volume remained low. *Supra*, pp. 6-9. There is no evidence that *on even a single day* Lessig wished to charge prices other than those in fact charged, much less that different prices would have resulted in increased profits. All these facts warranted the jury's conclusion that Lessig would not have charged more on gasoline than he did without reducing volume of sale, and that with reduced volume his profit would have been less, not more.

(b). From Alleged "Inability" to Buy TBA Elsewhere.

Assuming that Lessig operated under some limitation about buying TBA from sources other than Tidewater, whether he would have made more profit had he bought more TBA elsewhere than he did would depend on a number of factors: for example, how comparable a product could he have obtained elsewhere, could he have bought at the same price as the Tidewater item, or if he bought at the same price would this product command a greater price on resale than the like product obtainable from Tidewater. Lessig offered no evidence on these essential questions. Net profits, in short, are a function of acquisition cost, resale price, salability, and the cost of doing business. But there is not a single item of TBA as to which there was any evidence compar-

ing either the profits obtainable by handling a brand sold by Tidewater with the profits obtainable on another brand, or comparing the salability of the brands sold by Tidewater with the salability of other brands.[27] Lessig's brief asserts that he could buy other TBA cheaper. O.B. 32. If true, this would be irrelevant standing alone. But with one exception noted below, there is no evidence of its truth. Lessig's testimony was that he had compared TBA catalogs published by others with *price sheets* furnished by Tidewater, and that in some instances these other catalogs listed prices for other brands lower than the prices for brands *shown in Tidewater's price sheets.* R. 725, lines 6-11; R. 728-732. But the prices shown in Tidewater's sheets were *not* the prices the dealer actually paid, since prices to dealers were reduced by numerous regular and special discounts off list. *Supra,* p. 21. The one instance where there was evidence of lower acquisition cost is Lessig's testimony that "Auto Lux", "Amp King" and "Nic-L-Silver" batteries were cheaper than Tidewater batteries. *But he bought these batteries* (R. 726, 768, 770, 772), thus realizing whatever benefits, if any, their lower price afforded. Even here, he offered no evidence that lower acquisition cost resulted in any greater *profit,* for Lessig offered no evidence that a battery costing less did not have to be resold for less. This record patently warranted the jury in finding, as it did, that there was no damage.

II. NO EVIDENCE WAS IMPROPERLY EXCLUDED.

The flimsy nature of Lessig's case has been shown. The next question is whether a toehold for reversal can be found in exclusion of evidence.[28]

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27. Contrast *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 714 (9 Cir.):

> ". . . plaintiff offered proof . . . that 'Wax Seal' sold on the free market, as well or in many instances 3 to 7 times better than a product known as 'Mac's', and that Mac's was generally a comparable product."

28. As already noted (p. 3) *supra,* there is no claim that any evidence was improperly admitted.

A. On the Reasons for Cancellation of the Lease.

Lessig does not claim any improper rejection of evidence on this issue.

B. On the Makeweight Claims.

1. ON THE CLAIM THAT LESSIG WAS "UNABLE" TO BUY TBA FROM OTHERS.

On this issue Lessig scours the record for error and produces just two pieces of paper (P. Ex. 23, 24) he claims were improperly excluded (O.B. 79)—two credit invoices issued by Irving Auto Supply each dated March 31, *1961*—i.e., approximately 3 years *after* Lessig left—issued to one Anderson who was then operating the station. Evidence of something occurring 3 years after the events of the case and between two other persons would in any event be too remote and irrelevant. But, in addition, the proffered papers were both *meaningless and cumulative.* Mr. Hurley, of Irving Auto Supply, testified that Anderson had purchased brake shoes from Hurley's company (R. 10) and returned them. R. 13. The excluded exhibits simply reflected this transaction and no more. Offered in evidence to prove that Anderson "was required by the Tidewater Oil Company to return brake shoes" (R. 61), they contain no such evidence. As stated by Lessig: "Exhibits 23 and 24 simply show credits given on the purchase of brakeshoes." O.B. 79. They do not show *why* Anderson returned the brake shoes but simply that he did so, thus adding nothing to Mr. Hurley's testimony respecting their return. Although Anderson was alive (R. 9), he was not called as a witness to explain why he made the return, and no effort was made to connect the proffered evidence with this case.[29]

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29. Cf. R. 62:

"Mr. Keith: I submit, Your Honor, that we are going to connect the practices with respect to Mr. Anderson with the practices of Mr. Lessig while he was there.

The Court: When that is established the two exhibits that you have referred to will be admitted in evidence."

Nothing more happened.

2. ON THE CLAIM THAT LESSIG WAS "UNABLE" TO SET HIS OWN PRICES FOR GASOLINE.

Here the claim of error in the exclusion of evidence is made as to three matters. Yet one was purely cumulative, and the other two relate to other people and to events occurring years after the facts of this case.

The first is paragraph 3 of P. Ex. 10. That exhibit shows that discounts were given by Tidewater to various classes of gasoline purchasers. Lessig complains that by excluding paragraph 3 he was precluded from showing that dealers received no "discounts." O.B. 77. But whatever the paper would show is already in evidence. As stated by counsel below in respect of this exhibit (R. 278):

> "Mr. Keith: The matters set forth are in evidence.
> The Court: The matters are in evidence, but the document itself is not in evidence.
> Mr. Keith: That is clear."

And the court repeatedly advised counsel that he could ask any question that he wished concerning this exhibit. R. 165, 277.[30]

Lessig next complains of the exclusion of P. Exs. 73, 74. These were dealer aid forms dated May 10, *1960* and August 17, *1960*—two years and more after Lessig left the station. Moreover, they related to a Tidewater station located in *Oakland* and operated by the witness Ely (R. 491), who refused to pay his station rental (R. 465-466) and was evicted by a judgment of the Superior Court. R. 511. Ely was permitted to testify in detail to his conversations with Tidewater employees about retail prices of gasoline and dealer aid. R. 473-483; 486, 487, 496, 512-516. The

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30. In any event there is no relevance to the subject. Tidewater's pricing of gasoline to dealers was the subject of extensive testimony and numerous exhibits, the gist of which was that dealers paid the tankwagon price and, when price wars broke out, received dealer aid, which was simply a discount. R. 58, 59, 78, 157, 205, 635-637; P. Exs. 35-37, 77. Lessig's alleged grievance with respect to gasoline prices is not that dealers received no "discounts" but the very reverse, resting on the fact that dealers received "dealer aid". The fact that purchasers other than dealers received discounts was testified (E.g., R. 227, 229), and stipulated. (R. 279)

excluded exhibits related to two specific transactions and were excluded because they "are so remote both in time and location as to render them inadmissible." R. 522. This ruling is palpably correct. The question in the case was not *Ely's* arrangement with Tidewater, but *Lessig's*. The trial court was exceptionally lenient with Lessig's counsel and the bulk of the record is due to the persistent attempts to try every case except Lessig's. A line had to be drawn somewhere. Whether a specific transaction with another dealer in another city long after the fact was sufficiently probative to warrant further expanding the record was a question for the trial court's discretion, as Lessig's citations (O.B. 121) demonstrate. *Potlatch Lumber Co. v. Anderson,* 199 Fed. 742, 748 (9 Cir.); II Wigmore on Evidence, § 437, p. 417 (3rd ed. 1940). As stated in *Kennon v. Gilmer,* 131 U.S. 22, 25, cited by this Court in the *Potlatch* case:

> "The length of time afterwards to which such evidence may extend is largely within the discretion of the judge presiding at the trial."[31]

Lessig's third and last complaint respecting the exclusion of evidence is even more remote. O.B. 79, 122. It relates to an alleged conversation between Ely and a Tidewater representative at an even later date in January *1961*. R. 497. The court excluded Ely's testimony that he was told that Tidewater had settled Lessig's case for $75. R. 498. On what basis this could be relevant it is impossible to see. Lessig argues that it is evidence of Tidewater's alleged "intent to control retail prices". O.B. 123. Plainly the testimony was irrelevant, and the sole purpose of eliciting it was to inflame the jury by suggesting that a Tidewater employee had lied to a dealer.

Such is the triviality of Lessig's claim that evidence was improperly excluded.

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31. In *Wood v. United States,* 41 U.S. 341, cited by Lessig, defendant had made 29 importations during the years 1839 and 1840, some before and some after the four importations with which he was charged. 41 U.S. at 345. The question was one of fraudulent intent, where similar conduct is always admissible.

C. On Damages.

1. WITH RESPECT TO CANCELLATION OF THE LEASE.

Lessig's complaint here is the exclusion of Exhibits 107, 108, 109, 110, 111 and 112.

Exhibits 107 and 108.

These were merely cumulative. A Dr. Vance was called by Lessig as a witness and gave his opinion respecting Lessig's alleged loss of earnings as well as his opinion respecting the capitalized value of future earnings. R. 862, 876. P. Ex. 107 and 108 were prepared by Vance and contained the same material, in written form, as the testimony, no more,[32] other than that the exhibits were argumentative. P. Ex. 107, for example, stated, *as if a fact,* that Lessig's dealer contract had 2 years and 6 months left to run at the time the lease was cancelled, while P. Ex. 108 stated, *as if a fact,* that the gallonage of the station had increased by 6,000 gallons per month under Lessig's management and that this increase was due to Lessig's efforts rather than to the rebuilding of the station and Tidewater's investment. The *facts* of these matters were already in the record and Vance was not qualified to give factual evidence about them. Vance's *opinion* based on his assumptions, *is in the record* through his oral testimony. Lessig's counsel recognized that "the actual conclusions of Dr. Vance" were in the record. R. 894. The trial judge advised that any and all figures in the two exhibits could be used in argument to the jury (Ibid.), and they were so used. R. 982, 983. Thus, Lessig's present grievance is that he was entitled to have the same testimony placed before the jury twice, once when given orally and again in an argumentative document written by the witness.

Exhibits 109 and 110.

These compared Lessig's earnings with the average earnings of all *employees* of Tidewater. How that could possibly be rele-

32. The same is true of the repetitive examination of Dr. Vance about which Lessig complains at O.B. 75, 76, which the witness himself said called for just the same answer he had already given. R. 868.

vant is a mystery. Nevertheless, all the evidence is already in the record. The earnings of Tidewater employees were conceded to be in the record (R. 890), since they are contained in Tidewater's annual stockholder reports.[33] Everything was thus available to Lessig to "argue them for what they are worth." R. 894.

Exhibits 111 and 112.

These were plainly inadmissible. P. Ex. 111 purports to show the average income of service station operators in the United States! R. 882. It does not purport to reflect any facts within the knowledge of any witness but was said to be based on a Dun & Bradstreet survey, which was not produced. R. 882. It was thus hearsay on hearsay. It was also irrelevant. There is no such thing as an "average" service station. As this Court judicially knows, service stations are large and small, well run and badly run, favorably and unfavorably located. If as a basis of arguing what profits he lost Lessig wished to compare his profits with those of other stations, there were many others within a few blocks of his station. But he offered no figures about them.

P. Ex. 112 purports to show the mean and median income per person *of everyone in the United States,* said to be based on a publication of the U. S. Department of Commerce which was not produced. R. 883. Like P. Ex. 111, this is both hearsay several times removed and even more irrelevant.

2. WITH RESPECT TO THE MAKEWEIGHT CLAIMS.

As a matter of law Lessig sustained no damage (*Simpson v. Union Oil Co.,* ..... F.2d ..... (9 Cir.), 1963 Trade Cases, para. 70,612, p. 77,507) and no witnesses' conjectures or opinions could alter that legal conclusion. But even apart from that fact there was no error.

Lessig's grievance (O.B. 70-74) is that the Court did not permit him to answer five questions, the nature of which is such that we cannot separate discussion between the claim that he was "un-

33. P. Ex. 12, p. 13; P. Ex. 13, p. 15; P. Ex. 14, p. 16; P. Ex. 15, p. 15.

able" to set his own gasoline prices and the different claim that he was "unable" to buy TBA where he wished. The questions commingled everything. Thus the first incredible question of the series was (R. 734):

> ". . . can you state, based upon your experiences as a gasoline retailer, whether or not absent the practices you have described heretofore of the Tidewater Oil Company you would have achieved substantially more profits in the year 1955."

The question was bad for numerous reasons.

First, it was vague. The reference to the "practices" of Tidewater singled out nothing specific. The jury could not know what "practices" the witness had in mind in any answer he might give, and it would have been impossible for the jury to relate any answer of the witness to any specific facts to which the jury might attach legality or illegality.

Second, the question called for an opinion in a vacuum. Questions calling for expert opinion should include all material undisputed facts, "must be based on *facts* in evidence" and it lies in the discretion of the trial judge to determine whether a question should be reframed. *Standard Oil Company of California v. Moore,* 251 F.2d 188, 220 (9 Cir.). Here the trial court explicitly advised Lessig's counsel that he needed a better predicate, saying (R. 775):

> "The ruling was predicated upon the conclusion that the record does not offer enough, if any, material upon which a valid opinion could be predicated, and therefore any opinion as to a dollar loss *at this time, at least,* would be so conjectural and speculative as to be wholly without probative value."

Again (R. 778):

> "Mr. Keith. . . . I was precluded in my questioning of Mr. Lessig. . . .
>
> The Court: You weren't precluded from showing what the normal profit from the various factors which go into the

> matter of the profit in the operation of a service station generally; *it was the absence of any such foundation* which led to the ruling that you just mentioned."

But counsel never sought to lay such a foundation, and never returned to the subject again.

Before a plaintiff may express an opinion respecting the amount of his alleged damages, there must be specific evidence which would permit a jury to find that plaintiff's estimate was based upon *facts* which would supply some *rational basis* for approximating an amount. The record must, as this Court has put it, show "the factual basis upon which they rest their conclusions." *Flintkote v. Lysfjord,* 246 F.2d 368, 394 (9 Cir.), cert. den. 355 U.S. 835. See also *Baush Machine Tool Co. v. Aluminum Co. of America,* 79 F.2d 217, 227 (2 Cir.); *Momand v. Universal Film Exchanges,* 172 F.2d 37, 43 (2 Cir.); *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96 (8 Cir.).

The answer Lessig would have given, if he had been permitted to answer, was shown by an offer of proof. It was simply that he "would have estimated that his earnings and profits would have approximated approximately $700 per month." R. 775. But neither the offer of proof nor the record gives any clue as to how this amount, or any other amount, could be reached. This was simply an attempt to pull a figure out of the air. But as held in *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96, 102 (8 Cir.):

> "Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way."

Having asked the foregoing highly improper question, counsel persisted in repeating it with variations of language so slight as to make no change in substance. Thus he asked (R. 747):

> "Q. Mr. Lessig, state whether or not you could have increased your sales and profits but for the policies and practices of the Tidewater Oil Company during the period 1951 to 1958 with respect to your handling of competitive tires and batteries and accessories."

And (R. 747):

> "Q. State whether or not, Mr. Lessig, you could have increased your profits and earnings but for the practices and policies of the Tidewater Oil Company with respect to a high tank wagon dealer aid kind of price procedure."

While these sallies at the same question modify the generality of the all-exclusive "practices," the first by reference to TBA and the second by reference to "a high tank wagon dealer aid kind of price procedure," they broaden the question by the inclusion of "policies," an undefined term; and the references to TBA and "a high tank wagon dealer aid kind of price procedure" leave the question just as vague as before. The jury still could not know what "practices" or "policies" the witness had in mind in any answer that he might give, and could not relate any answer he might give to any specific facts to which it might attach illegality.

Moreover, these questions, like the first, called for an opinion in a vacuum. We have shown that Lessig was already buying 60% of his TBA from others (*supra*, pp. 18-19), and that there was no factual basis for a conclusion that additional such purchases would have resulted in greater profits to him. *Supra*, pp. 24-25. There was no evidence that anyone's gasoline price was lower than Tidewater's,[34] no evidence that Lessig could have bought gasoline cheaper than he did, no claim made in the Complaint or Pretrial Statement of Contentions that he wished to buy gasoline elsewhere, or that he ever tried to do so. Nor was there any evidence that dealer aid deprived him of anything. On the

34. The Court may judge for itself just how "high" Tidewater's tank wagon prices were. On November 1, 1956, Tidewater's San Francisco tank wagon prices in cents per gallon were 25.9 for "regular" and 28.9 for "ethyl," of which 9 cents was tax, yielding ex tax prices of 16.9 and 19.9. P. Ex. 35, p. 5. Tidewater's costs in cents per gallon were 11.4 for "regular" and 12.7 for "ethyl" (P. Ex. 93, lines 9 and 11(b); P. Ex. 94), leaving a *gross* profit of 5.5 and 7.2. Out of this Tidewater was giving Lessig dealer aid of 2.5 and 3.0 (P. Ex. 40, p. 15), reducing Tidewater's gross margins to 3.0 and 4.2. Meanwhile, Lessig was selling this gasoline for 31.8 and 35.3 (P. Ex. 83), thus realizing 5.9 and 6.4 over tank wagon *plus* his dealer aid, a total of 8.4 and 9.4—as compared to Tidewater's 3.0 and 4.2.

contrary, the evidence is that *dealer aid put a total of $1,764.40 in his pocket!* P. Ex. 77.

The last question being ruled bad, counsel simply asked it all over again, this time making it even more vague (R. 748):

> "State whether or not but for the conversations that you have heretofore testified to with respect—with Tidewater representatives during the period 1955 and 1958 and the impact of the practices of high tank wagon selling and dealer aid procedure you would have increased your earnings and profits at the service station at Twenty-Second and Irving during the period 1955 to 1958."

The reference to the conversations Lessig was supposed to have had with any Tidewater representatives throughout a period of 3 years simply made the question more incomprehensible. Instead of taking advantage of the Court's suggestion that he put in the record some *factual* foundation from which some intelligent appraisal of damages might be made, counsel persisted in an even more inexcusable question as follows (R. 747-748):

> "State whether or not you could have increased your earnings and profits during the period '55 to '58 while you were a Tidewater dealer but for the control of your business by the Tidewater Oil Company as established by their requirements as to TBA's, with respect to credit cards, inspection of the premises and their check-in policies, their two teaming, in bringing unordered TBA merchandise on your premises, the procedure at check outs—"

Not only did this question possess the same defects of vagueness and calling for an opinion in a vacuum, but it assumed the conclusion that "control of your business" by Tidewater was "established."

III. THERE WAS NO ERROR IN CHARGING THE JURY.

"With the hindsight so characteristic of many appellants, the plaintiff below now vigorously attacks the instructions of the District Court." *Persons v. Gerlinger Carrier Company,* 227 F.2d 337, 338 (9 Cir.). This attack is captious and churlish in view of

the highly favorable instructions given Lessig—so favorable that defendant could have justly complained if the verdict had gone the other way.

Lessig's brief complains of *11* instructions given as well as of *10* instructions proposed by him and not given.[35] Of the 10 instructions refused, 7 were already covered by the court's charge and 3 were improper. Of the 11 instructions given and now protested, only *2* were objected to on the ground of an erroneous statement of law. The objections, if any, to the other 9 were, diversely, that the instruction was unnecessary, correct as far as it went but incomplete, unclear or not based on any evidence. And in the case of most of these instructions, the grounds argued in Lessig's brief were not raised below.

Lessig simply ignores the rules governing appellate review of claims of error respecting the charge to the jury. A brief review of these rules is therefore in order; hereafter, we shall refer to them by reference.

1. Fed. R. Civ. P., Rule 51 provides:

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto . . . stating *distinctly* the matter to which he objects *and the grounds of his objection.*"

As stated in *Bertrand v. Southern Pacific Company,* 282 F.2d 569, 572 (9 Cir.):

> "These procedures are not mere technicalities. Rule 51 is designed to bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials."

From Rule 51 three principles immediately emerge:

1a. An instruction to which no objection is made is not open to review. *Bertrand v. Southern Pacific Company, supra; Siebrand v. Gossnell,* 234 F.2d 81, 96 (9 Cir.);

35. Exclusive of the monopoly instructions which we discuss separately at pp. 65-66, *infra.*

Persons v. Gerlinger Carrier Company, 227 F.2d 337, 342-343 (9 Cir.).

1b. An objection which states no grounds is a nullity. *Richfield Oil Corporation v. Karseal Corporation,* 271 F.2d 709, 718-722 (9 Cir.), *cert. den.,* 361 U.S. 961; *Brown v. Chapman,* 304 F.2d 149, 154 (9 Cir.); *Husky Refining Co. v. Barnes,* 119 F.2d 715, 717 (9 Cir.).

1c. A ground of objection not stated below cannot be assigned as error. *Southern Pacific Company v. Villarruel,* 307 F.2d 414, 415 (9 Cir.); *Hargrave v. Wellman,* 276 F.2d 948, 950 (9 Cir.); *Christensen v. Trotter,* 171 F.2d 66, 68 (9 Cir).

Additionally:

2. A trial court is not required to charge in the precise language that counsel wishes to put in the court's mouth. *Herzog v. United States,* 226 F.2d 561, 565-566 (9 Cir.), *rehr.* 235 F.2d 664 (9 Cir.), *cert. den.,* 352 U.S. 844; *Southern Pacific Company v. Guthrie,* 180 F.2d 295, 301 (9 Cir.), *cert. den.,* 341 U.S. 904; *Henderson v. United States,* 218 F.2d 14, 18 (6 Cir.), *cert. den.,* 349 U.S. 920; *Alexander v. Krauer Bros. Freight Lines, Inc.,* 273 F.2d 373, 375 (2 Cir.).

3. A trial court is not required to separate good from bad in a requested instruction (*Sweeney v. Erving,* 228 U.S. 233, 238; *Miles v. Lavender,* 10 F.2d 450, 455 (9 Cir.); *Chicago G.W.R. Co. v. Robinson,* 101 F.2d 994, 999 (8 Cir.), *cert. den.,* 307 U.S. 640), and before a refusal can constitute error the proffered instructions "must be accurate in every respect" (*Southern Railway Company v. Jones,* 228 F.2d 203, 213 (6 Cir.)) "in the very language requested." *Carpenter v. Connecticut Life Ins. Co.,* 68 F.2d 69, 72 (10 Cir.)

4. Instructions which assume, as uncontroverted, facts in dispute, are improper and rightly refused. *Insurance Co. v. Foley,* 105 U.S. 350, 353; *Carpenter v. Connecticut Gen-*

eral Life Ins. Co., supra; Pennsylvania R. Co. v. Ackerson, 183 F.2d 662, 667 (6 Cir.).

5. A litigant desiring further instructions must tender them in writing to the trial court and request that they be given. Failing to do so, he may not question the absence of such instructions. *Panther Oil & Grease Manufacturing Co. v. Segerstrom,* 224 F.2d 216, 218 (9 Cir.); *Goodman v. United States,* 273 F.2d 853, 856 (8 Cir.); *Comins v. Scrivener,* 214 F.2d 810, 815 (10 Cir.); *Metropolitan Life Ins. Co. v. Talbot,* 205 F.2d 529, 533 (5 Cir.).

Tidewater served and filed its basic set of requested instructions on February 1, 1962 (C.T. 74) almost *six weeks* before the jury was instructed. R. 986, 994. Five days before the jury was instructed Tidewater tendered four additional instructions (R. 901, 915) which were given (24A, 28A, 28B and 28D) and which Lessig seeks to attack here. Also five days before the jury was instructed, there was a conference in chambers in which the Court reviewed requested instructions with counsel and gave its preliminary views. R. 915-961. Lessig therefore had ample opportunity to tender any instructions he deemed necessary to clarify or augment.

We turn now to the individual instructions.

A. Relating to the Claim of Cancellation of the Lease.

It is not claimed that any instructions pertinent to this issue were improperly refused.

The sole claim here is that instruction 40 (C.T. 123, R. 1020, lines 8-16) should not have been given. This advised the jury that Lessig did not contend that Tidewater cancelled the lease for his failure to buy substantial quantities of TBA from it. This is, of course, a *correct* statement of Lessig's contention. Lessig's complaint alleged that the reason for cancellation of the lease was that he would not abide by Tidewater's retail price directions. O.B. 110. This claim was reasserted in Lessig's Pretrial Statement

of Contentions. C.T. 59, lines 14-16. And at the pretrial conference Lessig's counsel, after some ruminations on the subject (C.T. 64-67), came to rest on the claim that the cancellation was the result of failure to maintain gasoline prices. C.T. 68.

The only objection made to instruction 40 at the time it was given *admitted* that it was a correct statement of the fact. The objection was simply that it "unduly emphasizes something I am *not* directly complaining about." R. 1037. A court but does its duty when it tries to clarify a case for the jury; the office of instructions is not only to state the law but "to apprize the jury of the questions involved". *Terminal R. Ass'n of St. Louis v. Howell,* 165 F.2d 135, 139 (8 Cir.). This office is one that anti-trust cases particularly demand be discharged in view of their sprawling nature. Here Lessig had asserted one particular specific reason for the cancellation of his lease and adhered to that contention through pretrial. Nevertheless, in his argument to the jury at the close of the case, he began to make insinuations, in a hit-and-run manner (E.g., R. 976, 979, 980), which was highly improper. *Tingley v. Times Mirror,* 151 Cal. 1, 28, 89 Pac. 1097, 1108. It was the trial judge's duty to give instruction 40 so as to inform the jury of the real issue.

B. Relative to the Makeweight Claims.

Since a summary judgment on the makeweight claims would have been warranted under *Simpson v. Union Oil Co.,* ..... F.2d ..... (9 Cir.), 1963 Trade Cases, para. 70,612, a discussion of instructions could be omitted. We shall, however, show the frivolity of these claims too.

1. ON THE CLAIM THAT LESSIG WAS "UNABLE" TO SET HIS OWN PRICE FOR GASOLINE.

Here Lessig complains of the refusal of five instructions, Nos. 7, 8, 8A, 8B and 8E, and of the giving of three others, Nos. 15, 24 and 24A.

As the trial judge was not required to charge in the precise language counsel wished to put in the court's mouth (*supra*, p. 36, ¶ 2), we first note how fully the jury was instructed respecting Lessig's contentions, and how the instructions given were far more favorable to him than the law.

Lessig's theories were amply stated to the jury, thus (R. 1009):

> "He claims that during the period he was at 22nd and Irving Street he was required to charge retail prices enforced by defendant because of the tank wagon dealer aid system of pricing and the methods used by defendant to control retail prices."
>
> * * * * * * *
>
> "Plaintiff also claims that defendant intended to gain complete control over the business of lessees or dealers of Tidewater products so as to prevent the free exercise of business judgments by these dealers and gain thereby control of prices and power to exclude."

The jury was also instructed that the case involved charges of violations of the antitrust laws (R. 1007), and that the purpose of the antitrust laws was to preserve our system of free, competitive enterprise and competition in the market place. R. 1008. After noting that the action was brought under the Sherman and Clayton Acts (R. 1005), the court instructed that under Section 1 of the Sherman Act "every contract, combination or conspiracy in restraint of trade or commerce is illegal" (R. 1006), and specifically (R. 1008):

> "Thus, any interference by contract, or combination, or conspiracy, with the ordinary and usual competitive price system of the open market constitutes an unreasonable restraint of trade, and is in itself unlawful. The mere fact that there may be business justifications for the fixing of prices, or the fact that the wholly or partially fixed prices may be reasonable, will not relieve one guilty of such action from liability under the antitrust laws."

The jury was then instructed that Tidewater "could not lawfully superimpose on its leases limitations which require adherence to

price directions" (R. 1012), that it "could not utilize cancellation of leases to . . . require adherence to its price directions" (R. 1012) and (R. 1013):

> "Restraint of trade condemned by the Sherman Act is established when it is shown that a manufacturer or distributor *attempts to control prices* charged to the public after it has sold a product to its resellers."

By this instruction the Court read out of the Sherman Act the essential element of agreement, and instructed the jury that they might hold Tidewater liable to Lessig if it merely "attempted to control prices". With this, which goes far beyond what he was entitled to, Lessig's present complaints are indeed captious.

(a) No Error Was Committed in Refusing Requested Instructions 7, 8, 8A, 8B and 8E.

Requested Instruction 7 (C.T. 166): The substance of this instruction was amply covered by the charge actually given. Lessig is merely complaining because he could not put his argumentative and virtually unintelligible language in the trial court's mouth. *Supra,* p. 36, ¶ 2. Moreover, no ground was specified by Lessig in his objection to the court's failure to give instruction 7 (R. 1040) and there is therefore nothing to review. *Supra,* p. 36, ¶ 1b.

Requested Instruction 8 (C.T. 170-171): What has been said of instruction 7 applies equally to instruction 8. Lessig now argues that the Court should have given that portion of instruction 8 which referred to inferring agreements from a course of dealings. O.B. 90. But there was no objection at all to the failure to give instruction 8. *Supra,* p. 35, ¶ 1a. Lessig did not even request that *any specific portion* of the instruction be given. He objected "to the failure of the Court to give *an* instruction" (R. 1040 lines 15-16) and requested that "the Court give the jury language *similar* to this in instruction No. 8A."[36] (R. 1041, lines 7-8). This does not constitute the required tender of an instruc

36. The reference, presumably was not to Instruction 8A, but to subparagraph (a) of instruction 8.

tion. *Supra*, p. 37, ¶ 5. Furthermore, the instructions given by the Court repeatedly referred to agreements "express or implied" *and this very phrase had met with approval by Lessig's counsel* as entirely sufficient and adequate at the instruction conference. Thus (R. 931, 932):

> "The Court: Well, now, as to 39, I suppose that you want some modification of the word 'agreement', don't you?
>
> Mr. Keith: Yes, Your Honor.
>
> The Court: Express or implied.
>
> Mr. Keith: Express or implied. I think that is the language of the Sinclair case."

Then after the instructions were given, counsel asserted that 'I don't think the jury has a clear understanding of what an mplied agreement really is." R. 1041. But this was the precise hrase of Lessig's own instruction 7 (C.T. 166), and a court 'must ascribe to the jury a reasonable knowledge of the meaning f the English language." *Rogers v. Southern Pacific Co.*, 172 .A. 2d 493, 498, 342 P.2d 258, 261. It need not define words nd phrases which are familiar to one of ordinary intelligence *(Milwaukee Mechanics Ins. Co. v. Oliver*, 139 F.2d 405, 407 5 Cir.); *Atchison, Topeka & Santa Fe Railway Co. v. Preston*, 57 F.2d 933, 937 (10 Cir.)), and the words "express or im- lied" fall in this category. *McQuillen v. Meyers*, 213 Iowa 366, 41 N.W. 442, 445. The emptiness of this claim of error is ap- arent when it is recalled that the court's charge permitted the ury to hold Tidewater liable *without finding any agreement what- ver*, simply if it "attempted to control prices charged to the ublic".

Requested Instruction 8A (C.T. 172): This was a request for peremptory instruction that "Tidewater has unlawfully con- rolled retail prices of dealers". It was a request for a directed erdict for plaintiff and it would have been plain error to give it.

Requested Instructions 8B and 8E (C.T. 173, 176): By these, essig asked the Court to tell the jury that it *"is* unlawful" for 'idewater to grant dealer aid on condition that a dealer fix a

price "as directed" by Tidewater (8B) or on condition that a price sign be posted (8E). By the instructions reviewed at pp. 39-40 above, the court instructed that any attempt to control resale prices would be illegal if they had occurred. The vice of requested instructions 8B and 8E is that they *assumed* and charged as a fact that Tidewater did the acts.[37] These were controverted charges, and, as we have seen, the jury found, on more than sufficient evidence, that the alleged acts had not occurred. Instructions which assume, as uncontroverted, facts in dispute are improper and rightly refused. *Supra*, p. 36, ¶ 4. Lessig himself received dealer aid[38] despite his going his own way on prices and his refusal to post a price sign (See pp. 14-16, *supra*), and there was not a syllable of evidence that any dealer was refused dealer aid for failure to post a sign.

(b) No Error Was Committed in Giving Instructions 15, 24 or 24A.

Instruction 15 (C.T. 89, R. 1007-1008): This instruction advised the jury that no claim was made in this case that Tidewater illegally combined, conspired or contracted *with any other oil company or corporation,*—that is to say, no horizontal conspiracy—and therefore such was not an issue in the case. Count Two of the complaint (C.T. 11-20) had originally alleged a conspiracy between Tidewater and other oil companies, but that count had been dismissed before trial (C.T. 69, lines 23-25), and no error is here claimed in respect of that action. Contrary to the assertion in Lessig's brief that he objected (O.B. 63), his only statement to the trial court which could possibly be related to this instruction was (R. 1044):

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37. Lessig argues as to 8B that there was error in failing to instruct "that *it would be* unlawful" to grant dealer aid conditioned on a price (O.B. 41) and urged the trial court as to 8E "that *it would be* an unlawful practice" to require signs. R. 1042. But this was not what these instructions said.

38. Lessig received over 170 days dealer aid in 1956, 1957 and 1958 i.e., for nearly a one-half year out of 3 years. P. Ex. 77.

". . . I do think that the Court should tell the jury that Tidewater is engaging in practices which in effect require these *dealers* to agree to uniform prices and that *that* is the kind of combination that the Court so finds in this action."

But this was not an objection to the instruction given. *Supra,* p. 35, ¶ 1a. At best it was an argument that the Court should give a peremptory instruction that there was an unlawful *vertical* conspiracy. No such an instruction was ever tendered and it would have been error to give it. Lessig does not now argue that instruction 15 was an erroneous statement about the issues of the case. He simply argues that the instruction was "unnecessary", that "plaintiff was entitled to a full and complete statement" and that there was a "combination as a matter of law" between Tidewater "and the coerced dealers". O.B. 111. The complaint as the case went to trial contained no averment of conspiracy, and the first matter settled at pretrial was that no claim of conspiracy was involved. Thus, C.T. 50, 52:

"Mr. Haas: Well, then, I take it from what you are saying that the Lessig case as respects count one is not a conspiracy case?

Mr. Keith: That is right. Contracts—

Mr. Haas: You do not allege that the defendant Tidewater has conspired with anyone in count one?

Mr. Keith: That's right."

No claim of conspiracy was set up in plaintiff's Pre-Trial Statement of Contentions. C.T. 55-59. As noted at p. 56, *infra,* the trial court advised in advance of trial that it would be necessary to adhere to the pre-trial statement of contentions, and Lessig never asked to be relieved of that ruling. Yet despite these prior proceedings, Lessig's counsel at the trial examined concerning Tidewater's pricing practices in relation to those of other oil companies. R. 158-159, 179. He cannot complain that the trial court took steps to prevent the jury from being confused. The instruction said nothing whatever about vertical conspiracies with

dealers, and had Lessig wished an instruction on that subject it was his duty to submit one. *Supra,* p. 37, ¶ 5.

Lessig finally argues that the instruction "immunized" the contracts between Tidewater and its TBA suppliers (O.B. 111), whatever that means. Lessig urged no such ground below (*supra,* p. 36, ¶ 1c), and it suffices to say that there is no evidence about contracts between Tidewater and any TBA supplier other than contracts whereby Tidewater bought TBA.[39]

Instruction 24 (R. 1015): This advised the jury that it was not unlawful for Tidewater to inform Lessig of its opinion that his retail prices were so high as to be likely to cause him to lose sales and customers. Lessig's only objection to the instruction when given was that it was not "based upon any evidence." R. 1032. But Lessig's brief now claims error on the ground that there *was* such evidence! Thus (O.B. 99):

> "Mr. Weaver said nothing about losing sales or customers to Mr. Lessig (R. 681); nor did Mr. Finn (R. 682-683); nor did Mr. Nichols or Mr. Thompson (R. 684-685); nor did Mr. Coleville (R. 685). *But Mr. C. R. Clark, District Marketing Manager of Tidewater, did!* He asked Mr. Lessig how he 'expected to sell gasoline at such a high price!' (R. 687)." (Emphasis in the original.)

An appellant cannot overturn a jury verdict on a ground exactly opposite to that asserted below. *Supra,* p. 36, ¶ 1c. The ground of objection stated below is now conceded to be bad.

Lessig's brief argues that this instruction was a judicial comment "that the Clark-Lessig conversation specifically was perfectly lawful." O.B. 99. This is not so. The only evidence of what Clark said is Lessig's own testimony. According to Lessig, Clark did, *inter alia,* tell Lessig that his prices were so high that loss of sales and customers was likely. Clark's saying that much was

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39. Lessig's brief asserts that "these contracts were basic proof of the existence of Tidewater's program to require dealers to buy only TBA authorized or sponsored by it." O.B. 111. This Court need only look at the contracts (P. Ex. 43, 45, 66) to see that there is nothing in them remotely supporting such a description. Moreover, since Lessig bought what he wanted when and where he wanted, the whole subject is irrelevant.

not improper. Whether Clark said anything *more* the Court did not say, one way or another, but left for the jury to decide in the light of the instructions that Tidewater could not cancel leases to require adherence to its price directions. *Supra*, p. 40.

Lessig's further arguments are that other instructions would have been in order if requested. But they were not requested. It is argued that lawful acts "lose that character when they become constituent elements of an unlawful scheme" (O.B. 98), "that price discussions may take place . . . only without any unlawful intent, plan, purpose or effect" (O.B. 99), and that "the jury was not told" these principles. O.B. 99. This may or may not be good law. It is enough that Lessig proposed no such instructions, although he had six weeks to request whatever additional instructions seemed called for. *Supra*, p. 37.

Instruction 24A (C.T. 100-101, R. 1015-1017): This advised the jury of California statutes regulating the form of signs used to advertise gasoline prices. Here again, Lessig's objection was not that the instruction was incorrect. It was that it "unnecessarily emphasizes the state law . . . which has no application to this action". R. 1038. But Lessig himself injected the subject of signs into the case; indeed with the first dealer witness he called. R. 57. His counsel then went into Tidewater's manufacture and distribution of gasoline price signs through six more witnesses. R. 124, 232-236, 429, 496, 558-561, 684. From this he sought below, and seeks here, to find something sinister. If a jury is asked to draw inferences from facts, it must have them in their factual context, and the factual context of service station price signs in California includes the California statutes. On examination by Lessig's counsel it was testified that many dealers requested Tidewater to furnish signs (R. 560), that there was a state law regulating the form of such signs (R. 558), and that as a practical matter Tidewater had to provide signs because "we couldn't conceive that a thousand dealers or more could put up a sign that would meet with this law without going to a great deal of cost and trouble." R. 558. The jury thus had to know what the statutes prescribed.

Lessig argues that the jury should have been told that the "real issue" was whether signs were utilized to "control" retail prices and that "State law may not be used as a subterfuge for price fixing" (O.B. 101), and that the jury was not instructed on the California Unfair Practices Act or the Cartwright Act. O.B. 101. But Lessig tendered no instructions on any of these matters (*supra*, p. 37, ¶ 5), and supposed violations of the statutes last named were outside the issues and beyond the Court's jurisdiction.

2. ON THE CLAIM THAT LESSIG WAS "UNABLE" TO BUY TBA FROM OTHERS.

Lessig asserts error in the refusal of one instruction (requested instruction No. 9) and in the giving of seven others, Nos. 23, 28, 28B, 28D, 32, 34 and 38. We first show that Lessig's contentions were fully stated to the jury, and that the instructions were more favorable to Lessig than warranted by law.

Lessig's theory was that his relationship with Tidewater respecting TBA was either an exclusive dealing arrangement condemned by Section 3 of the Clayton Act or a tying agreement denounced by Section 1 of the Sherman Act. C.T. 177-179; R. 980. The jury was specifically so instructed. R. 1010. They were also instructed of Lessig's claim that: "he was prevented from freely dealing in" TBA manufactured or distributed by competitors of Tidewater (R. 1009); that Tidewater "makes it clearly understood, and enforces by inspection and reporting, and utilization of short term leases with the probability of cancellation, the condition that these TBAs are purchased from Tidewater or authorized distributors and no one else" (R. 1009); that Tidewater "intended to gain complete control over the business of lessees or dealers of Tidewater products so as to prevent the free exercise of business judgments by these dealers" (R. 1009); that Tidewater "utilizes its leases to provide short term cancellation clauses so as to allow it to use the threat of cancellation to effectuate restraints of trade" R. 1009. These contentions having been told the jury once, they were then told to the jury again (R. 1012):

"As to the alleged exclusive dealings and illegal tie-in arrangements involved in the case; it is plaintiff's contention that defendant restrained his freedom to trade and deal in certain petroleum products, tires, batteries and accessories.

The plaintiff asserts that defendant requires dealers to acquire products known as TBAs exclusively from Tidewater. *This is accomplished,* it is claimed, *by both written agreements and demands from Tidewater enforced by understandings extracted at the time the lease or sales agreements are entered into,* and enforced by threat of lease cancellation."

The jury was also told of the Sherman Act's purpose to preserve free competition (*supra,* p. 39) and (R. 1010-1011):

"Section 1 of the Sherman Act condemns *all* contracts or *agreements* in restraint of trade. Thus it prohibits agreements express *or implied* which require customers of a manufacturer to purchase or acquire unreasonably other articles manufactured or distributed by the manufacturer in order to obtain a desired product manufactured by the same manufacturer or distributor. The article desired is the tying article and the article required purchased to obtain it is called the tied article.

It is unlawful for a manufacturer of petroleum products such as Tidewater to lease service stations or sell Tidewater petroleum products *on condition* that the dealer buy substantial amount of tires, batteries and accessories from it or its distributors.

A tying agreement is defined as 'an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (tied) product, at least agrees that he will not purchase that product from another supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed.'

In other words, the law has been violated if the defendant compels his customers to purchase *a quantity* of one product when they seek to buy another, the desired product. *It is the restrictive nature of the agreement not the exclusivity which is objectionable."*

The Court further instructed that Tidewater "could not lawfully superimpose onto its leases limitations which required . . . that the lessees purchase a substantial amount of TBAs from Tidewater" (R. 1012), that it "could not utilize cancellation of leases of the threatened possibility of cancellation of leases to force upon its lessees restrictions as to the type of TBA products handled" (R. 1012) and that "restraints of trade include restraint in the free exercise of judgments by those engaged in trade or business". R. 1012-1013. Section 3 of the Clayton Act was first stated to the jury in abbreviated form (R. 1006) and then *read to the jury in its entirety*. R. 1045, 1046.

The jury was further instructed that it was not limited to "the bald statements of witnesses", but was "permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience". R. 997.

(a) No Error Was Committed in Refusing Requested Instruction 9 (C.T. 177).

In the face of these sweeping instructions, Lessig scrabbles for error in the refusal of his proposed instruction number 9. O.B. 45. The effort fails for several reasons.

Requested instruction 9 is long and complex, consisting of *nine* paragraphs and over 370 words. The bulk of it was amply covered by other instructions given and digested above, and the Court was not required to charge in counsel's language. *Supra*, p. 36, ¶ 2. Very little of it is now claimed by Lessig to have been left uncovered by other instructions. In his brief, Lessig complains about the refusal of this instruction in that it contained a statement that the alleged agreement might be based "on all the circumstances and facts attending the issue" and that the understanding might be "oral". O.B. 93. To be sure, buried in the mass of verbiage of this proposed instruction there are such references. But their substance was certainly covered by the instructions given and reviewed above. In its instructions on both the Sherman Act (R. 1010, line 13) and the Clayton Act (R. 1013, line 23) the Court's instructions referred to agreements "express or implied".

as well as to the claim of "understandings extracted at the time the lease or sales agreement are entered into" (R. 1012, lines 12-13), a plain reference to Lessig's testimony respecting an oral agreement. Indeed, in objecting to the refusal of instruction 9 counsel confessed "I do believe that portions of it [Instruction no. 9] were given". The Court responded "I think the portions omitted of No. 9 were both repetitive and in part unintelligible". R. 1041. At this juncture, it was counsel's duty to point out specifically the non-repetitive portions, if there were any, for, as stated in *Palmer v. Hoffman,* 318 U.S. 109, 119:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."

But at the trial Lessig pointed to no omissions. His entire objection was simply this: "I would respectfully object to the Court's not giving all of plaintiff's No. 9." R. 1041. This, however, is not compliance with Rule 51. *Supra,* p. 36, ¶ 1b. The very purpose of Rule 51 is to silence the kind of afterthought search for error Lessig here engages in.

Lessig's only other argument respecting this instruction is that the Court did not tell the jury "that Tidewater violated the Sherman and Clayton Act if it had required its dealers to buy virtually all of their *petroleum products and oil supplies* from Tidewater, and such practices affected a substantial amount of commerce." O.B. 93. The sixth paragraph of instruction 9, a peremptory instruction, was directed to this subject, but the matter was fully covered by reading to the jury Section 3 of the Clayton Act in its entirety.[40] Furthermore, it would have been error, for at least three reasons, to have given this sixth paragraph, and that

40. Neither the *Standard Stations* case, 337 U.S. 293, on which Lessig relies, nor any other case, holds that total requirements contracts are *per se* violations of the Sherman Act as the instruction states. Furthermore, if such contracts do not violate Section 3 of the Clayton Act they do not violate the narrower prohibitions of the Sherman Act. *Tampa Electric Co. v. Nashville Co.,* 365 U.S. 320, 335.

error vitiates all claims Lessig makes here respecting the refusal of instruction 9. *Supra,* p. 36, ¶ 3.

First, the sixth paragraph is unintelligible, as the trial court observed (R. 1041), and makes no reference to *interstate* commerce.

Second, it would have been error to give the sixth paragraph because Lessig *claimed no damage* from an agreement requiring dealers to buy virtually all *petroleum and oil* products from Tidewater. His exclusive dealing contention was that he sustained damages from an alleged inability to buy *accessories* distributed by others. Complaint, para. 27(b), C.T. 10. His only claim as to gasoline was that damages flowed *not* from any supposed "inability" to buy from others, but from inability "to fix and establish his own retail price." Complaint, para. 27(a), C.T. 10. He made no attempt to prove that he even wished to buy gasoline from someone else.[41]

Third, the sixth paragraph of proposed instruction 9 was erroneous, because *Tampa Electric Co. v. Nashville Co.,* 365 U.S. 320 has made clear that exclusive dealing contracts are *not* unlawful merely because large amounts of merchandise and dollars are involved. The test is not, as Lessig proposed, whether a "substantial amount of commerce" is affected, but whether there is a foreclosure of competition in a substantial *share* of the line of commerce involved in the *relevant market.* 365 U.S. at 327, 328. "It follows," the Court said, "that a mere showing that the contract itself involves a substantial number of dollars is ordinarily

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41. Lessig was not the Attorney General, authorized to challenge all of Tidewater's business dealings. As stated in Simpson v. Union Oil Company, ... F.2d ..... (9 Cir.), 1963 Trade Cas. para. 70,612, pag 77,506:

> "It is clear that the private litigant in a suit charging violation o the antitrust laws stands in a different position than the governmen in an antitrust action. In a government action, there need be presen only a violation of the laws and damage to individuals need not b shown. The private litigant must not only show the violation of th antitrust laws, but show also *the impact of the violations upon hi and damage to him resulting from the violations* of the antitru laws."

of little consequence." 365 U.S. at 329. Lessig relies on the *Standard Stations* case, 337 U.S. 293, but as stated in *Curly's Dairy, Inc. v. Dairy Cooperative Association,* 202 F. Supp. 481, 484 (D. Oregon), the *Tampa Electric* case has narrowed *Standard Stations* to its own facts.[42]

It may be gilding the lily to note that the seventh and eighth paragraphs of instruction 9 were also erroneous for similar reasons. These paragraphs would apply the same improper standard to supposed exclusive TBA understandings as the sixth paragraph sought to apply to gasoline, ignored the requirement of *interstate* commerce, and contained an unintelligible reference to "Sections 1 and 3 of the Clayton Act". Furthermore, there is no evidence whatever of the total amount of TBA sold anywhere. All the record shows is that many thousands of persons, including Sears Roebuck, Montgomery Ward, and even drug stores engage in this business. R. 340-343.

(b) No Error Was Committed in Giving Instructions 23, 28, 28A, 28B, 28D, 32, 34 or 38.

Instruction 23 (C.T. 98, R. 1011): This advised the jury of California statutes requiring gasoline pumps and tanks to be labelled and prohibiting the dispensing through them of gasoline of a brand other than that marked on the equipment. Lessig's

42. Since paragraph 6 of proposed instruction 9 went too far, we do no more than note that the evidence here would not even bring the case within a correct enunciation. In *Tampa Electric,* the Court was at pains to point out that the *Standard Stations* case involved contracts with stations comprising *16%* of the retail outlets in the *relevant market.* 365 U.S. at 328-329. Here, there is no evidence whatever of the percentage of the total number of gasoline retail outlets in any market made up by Tidewater stations. In the *Standard Stations* case, Standard's share of gasoline sales in the relevant market was 23% (337 U.S. at 295); here there is not even evidence of what constitutes the market, and the only evidence of share is that "on the West Coast" Tidewater does about 6½% of the business in gasoline. R. 286. In the *Standard Stations* case, 6.7% of the gasoline of the market flowed under Standard's exclusive contracts. 337 U.S. at 295. Since Tidewater sells gasoline to many persons who are not service station dealers (R. 206, 209-213), as well as to service station dealers with whom it has no contracts at all, (R. 139, 150), far less than the 6½% it sells on the West Coast flows under its dealer contracts.

argument here is essentially the same as that concerning instruction 24A, discussed at pp. 45-46, *supra.*

It is not claimed that instruction 23 incorrectly states the law. It is plainly correct. Cal. Bus. & Prof. Code §§ 20840, 20849-20851; *Serve Yourself Gas, etc. Association v. Brock,* 39 Cal. 2d 813, 821, 249 P.2d 545, 550. As in the case of instruction 24A, Lessig's sole objection was that the instruction was "unnecessary to the issues raised in this action." R. 1038. Had Lessig's counsel confined himself to *those issues,* the instruction would not have been proposed. But counsel went afield to confuse or inflame the jury by suggesting that the dealer contract required Lessig to buy all his gasoline from Tidewater. E.g. R. 150-151, 809-810, 967. One of the innuendoes was that the jury could infer a requirement on Lessig to buy all his gasoline from Tidewater from the fact that he did so. The State statutes are part of the factual context, and by virtue of them, in order lawfully to handle gasoline acquired from others, Lessig would either have had to install a separate set of tanks and pumps or to relabel those already at the station. The jury was entitled to know this fact in order to be equipped to draw sound inferences about why Lessig apparently did not buy any gasoline elsewhere.[4]

Instruction 28 (C.T. 105, R. 1018): This advised the jury that Tidewater was entitled to urge dealers to buy TBA from it, and to "express disappointment" when it found a dealer buying TBA from someone else. The instruction is plainly correct. "Of course a seller may attempt to persuade a buyer to purchase his product rather than those of his competitors". *Osborne v. Sinclair Refining Company,* 286 F.2d 832, 836 (4 Cir.). Salesmanship is no

43. We say "apparently" because there was no testimony on the subject although Lessig's records of gasoline sales correspond to a high degree with Tidewater's records of gasoline deliveries.

As for Lessig's further argument (O.B. 105) that this instruction conflicts with the *Standard Stations* case, little need be said. No such objection was urged below, and therefore it cannot be assigned as error. *Supra,* p. 3, ¶ 1c. Furthermore, it is specious. The State law does not purport to prevent a dealer from buying whatever gasoline he chooses, but simply protects the public from fraudulent substitution.

denounced by the law. As said in *McElhenney Co. v. Western Auto Supply Company*, 269 F.2d 332, 338 (4 Cir.):

> ". . . it was Western Auto's policy to have its associated retail stores push its own products and . . . it frowned upon their handling of competing goods . . . . But so far as the complaint shows it exacted no agreement. . . ."

Expressing disappointment when one buys from another is the other side of the coin of urging him to buy your product, and is a far cry from Lessig's postulate (O.B. 100, 101) of "telling" someone "not to buy other products" and from "denying to dealers the right to deal with other suppliers".

Lessig's further argument that the instruction "was not supported by the record", (O.B. 99) is not only untrue (R. 651, 652) but no such objection was made below. *Supra*, p. 36, ¶ 1c. As for his final argument that, *if* Tidewater succeeded in selling *all* its dealers *all* their TBA it would be in *per se* violation of law (O.B. 101), it is enough to say that there is not a flicker of evidence of that salesman's Valhalla in this case.

Instruction 28A (C.T. 106, R. 1018): This told the jury that Tidewater might lawfully authorize only merchandise bought from it to be placed on its credit cards. This is plainly correct. Can anyone imagine any reason why an oil company should assume credit risks and expenses in connection with merchandise or transactions with which it has no possible connection? Having some regard for common sense, Lessig did not urge otherwise below, but limited his objection to the assertion that the instruction *"was not a complete statement"* (R. 1039), and that *"Although the antitrust laws will not specifically condemn the manner in which Tidewater handled credit cards,* the antitrust laws *would* specifically condemn how these credit cards were handled *if* they were part of a program to require dealers to handle TBAs exclusively". R. 1039. This concedes that the instruction was correct as far as it went, but urges that it was incomplete. That the present grievance is about alleged incompleteness is also apparent from the argument made in the brief that "the jury should have been

advised" and "instructed" of Lessig's various theories. O.B. 103. But Lessig neither requested nor submitted any further instruction, although he had ample time to do so. He may not now question the absence of further instruction. *Supra*, p. 37, ¶ 5. As held in *Metropolitan Life Ins. Co. v. Talbot,* 205 F.2d 529, 533 (5 Cir.):

> "If the defendant desired a more specific charge than this, it was its duty, not merely to ask for such a charge generally, but to tender the requested charge to the trial judge in writing and ask him to give it."

In fact, nothing in the record would support Lessig's theories about credit cards. No such claims were asserted in the complaint (C.T. 1-11), or in Lessig's Pre-Trial Statement of Contentions (C.T. 55-59), or in Lessig's proposed instructions. C.T. 158-191. The undisputed evidence was this: The dealers turned in their copies of the tickets reflecting credit card sales, which were accepted by Tidewater as cash. R. 338. If the customer paid the charge, that was the end of the matter, irrespective of the goods or services furnished by the dealer. R. 338, 339. If the customer did not pay, the credit ticket was examined. If the goods or services were shown on the ticket to be of a kind not authorized to go on the credit card, the dealer was charged back. R. 340. But if the ticket read merely for example, "tires" or "batteries", there was no charge-back and, knowing this, the dealers prepared the tickets in this manner. R. 340. The proportion of credit card purchases charged back to dealers was *one-tenth of one percent* (R. 340), and there is no evidence that Lessig was ever charged back for any TBA sale.[44]

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44. Lessig's brief asserts that Tidewater obtained rebates from its TBA suppliers on sales by Tidewater dealers (O.B. 103), citing P. Ex. 56 which has nothing to do with the subject. The relevance of this assertion eludes us, but in any case it is not true. Tidewater received additional discounts from some of its TBA suppliers when *Tidewater* sold TBA to *other wholesalers*. This was simply Tidewater's profit in inter-wholesaler transactions. R. 285, 286. Exemplars of Tidewater's reports to its TBA suppliers made to obtain these discounts are in evidence (P. Ex. 42, 44, 49-51), and show on their face sales by Tidewater to other wholesalers.

Instruction 28B (C.T. 107, R. 1018-1019): This advised the jury that no claim was asserted in the case that Tidewater's policy in classifying its dealers so as to charge different prices for TBA was illegal, and that therefore, in determining Lessig's TBA claim, "you are instructed that Tidewater's practice in this connection was entirely lawful". Lessig's objection to this instruction, stated immediately after his objection to instruction 28A, was in three sentences. R. 1039.

The first was: "I think the same objection may be lodged with respect to 28B." Since instructions 28A and 28B dealt with two different subjects, this objection was without meaning unless it meant to say that instruction 28B was incomplete, as the arguments of Lessig's brief suggest. If that was the objection, it was incumbent on Lessig to proffer a further instruction. *Supra*, p. 37, ¶ 5. The Court invited him to do so in these words: "If you think that instruction requires some augmentation, submit an instruction". R. 955. Counsel did nothing.

The second sentence of Lessig's objection was: "I think the evidence shows that contrary to what is stated in the instruction, that there was a discriminatory TBA arrangement". R. 1039. This misunderstood the instruction. The court did *not* tell the jury that there was not a "discriminatory TBA arrangement". The instruction did not advise the jury respecting the evidence; it delineated the issues. It simply told the jury that Lessig had made no claim in the case that Tidewater's policy was illegal, for this was not a Robinson-Patman Act case.

Lessig's brief now argues that he "did complain" of discriminatory pricing practices, referring to *testimony* given at the trial. O.B. 107. No such objection was voiced below. *Supra*, p. 36, ¶ 1c. Moreover, it is a play on words. As noted, the instruction did not comment on the evidence but delineated the issues. The complaint (C.T. 1-11) contains no hint of price discrimination in the sales of TBA; the offenses charged are alleged violations of "Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. 14". C.T. 4, lines 25-26. Lessig's Pre-Trial Statement of

Contentions (C.T. 55, lines 27, 28) contains no suggestion of discriminatory TBA prices. Faced at pre-trial conference with the usual vacillations of counsel (C.T. 63-68), albeit nothing was said about Robinson-Patman, the Court gave fair warning by stating: "I am going to require the plaintiff to adhere to the pre-trial statement which is presently on file." C.T. 68. As already noted, Lessig never sought to be relieved of this ruling. It is too late to try, on appeal, to convert this action, for the first time, into a Robinson-Patman case. A claim that "the classification system of Tidewater was shown to be discriminatory in violation of the Robinson-Patman Act and the Clayton Act" (O.B. 108), is a wholly different lawsuit from that tried below.

The third sentence of the objection to instruction 28B was that it was "an incorrect statement of the law." R. 1039, line 23. This preserves nothing for review, for it does not point out wherein an instruction is erroneous. *Apperwhite v. Illinois Central Railroad Company,* 239 F.2d 306, 310 (8 Cir.); *American Fidelity & Casualty Company v. Drexler,* 220 F.2d 930, 935 (5 Cir.); *Baltimore & Ohio R. Co. v. Commercial Transport Inc.,* 273 F.2d 447, 449 (7 Cir.); *Palmer v. Hoffman,* 318 U.S. 109, 119.

Instruction 28D (C.T. 109, R. 1018): This advised the jury that it was not unlawful under the antitrust laws for Tidewater to introduce to its dealers representatives of manufacturers from whom Tidewater buys TBA, and that those laws did not require it to introduce representatives of manufacturers from whom Tidewater does not buy. As in many other instances, Lessig's objection was not that the instruction was incorrect but that it was "incomplete", and that "Tidewater could not introduce dealer representatives (sic) as part of an exclusive dealing arrangement" R. 1039. But, as in the other instances discussed above, Lessig proffered no additional instructions on these theories, although having ample time to do so. *Supra,* p. 37, ¶ 5.

Lessig's own testimony demonstrates that the introduction of manufacturers' representatives was for entirely lawful purposes. Thus (R. 667, 668):

"Q. [By Mr. Keith] Could you state whether or not you were solicited at these occasions to purchase the articles that were represented by the representative of the manufacturing company?

A. Yes, sir.

* * * * * * *

Mr. Keith: Q. Would each representative, one from Tidewater and one from the manufacturer, motivate you to buy the merchandise, sir?

A. Yes, sir.

The Court: What do you mean by "motivate", Mr. Keith.

Mr. Keith: That's the term that Tidewater uses, sir.

The Court: How do you use it? What do you mean by "motivate"?

The Witness: I would say solicitation of merchandise.

The Court: What do you mean by "solicitation"?

The Witness: To try to get them to sell you this particular merchandise.

The Court: Isn't that what every salesman does?

The Witness: Yes, sir, they do."[45]

Instructions 32 and 34: Instruction 32 (C.T. 113, R. 1017) drew a distinction between a dealer's simply buying TBA from Tidewater and an *advance* commitment to do so. After this instruction was given, Lessig did not object thereto as incorrect but only as possibly unclear in that the words "in advance" used here, and in the same context in instruction 34 (C.T. 115, R. 1019), were "not clear . . . whether it was made in advance of

45. At O.B. 102 Lessig cites *F.T.C. v. The Goodyear Tire & Rubber Co. and The Atlantic Refining Co.,* Dkt. No. 6486, Trade Reg. Rep., C.T.C. Complaints, Orders, Stipulations, 1960-1961, para. 29,426. It is irrelevant to anything under discussion. It was a proceeding charging not any violation of the Sherman or Clayton Acts, but an "unfair method of competition" under Section 5 of the Federal Trade Commission Act, a action cognizable only by the Commission. Moreover, the practice there involved was a so-called "sales commission method" of merchandising TBA, which has nothing to do with this case. Under that method, the oil company does not buy and resell TBA as Tidewater does, but receives a commission for inducing its dealers to buy merchandise from another. Counsel's theory of brief writing is that if any practice whatever of any oil company has been assailed anywhere, this is water for his wheel.

going into the property or in advance of his buying such merchandise." R. 1035. But at the instruction conference (*supra,* p. 37), the following occurred when instruction 32 was discussed (R. 928):

"Mr. Keith: 32 is *all right.*
The Court: 32 is agreeable?
Mr. Keith: *All right.*
The Court: All right."

While there was no obligation on counsel to voice objections to instructions at this conference, counsel could not there *affirmatively approve* an instruction as "all right" and then complain of its being given. *Morissey v. United States,* 70 F.2d 729 (9 Cir.), cert. den. 293 U.S. 566; *Orenstein v. United States,* 191 F.2d 184, 193 (1 Cir.); 88 C.J.S., Trial, § 414.

Furthermore, a mere reading of instruction 32 shows that the objection of lack of clarity is without merit. Since it speaks solely in terms of buying merchandise, "in advance" means in advance of buying. Lessig's argument is not only a specious afterthought, but his counsel recognized that it was of no consequence, for in the very breath of the objection he said *"the evidence does show that it [the alleged agreement] was made in advance."* R. 1035.

Counsel again showed, in connection with instruction 39, that he considered the matter of no importance. That instruction (C.T. 121, R. 1011-1012) is not attacked here although it also contained, in the same context, the phrase "in advance." At the instruction conference Lessig's counsel asked and received two revisions to instruction 39, viz., that the word "agreement" be modified with the prefatory words "express or implied" and that a reference to Lessig's having the burden of proof be deleted. R. 931-933, 1011-1012. He said nothing whatever about the phrase "in advance". To argue now that this phrase in instructions 32 and 39 is "highly prejudicial" (O.B. 107) trifles with the Court.

Instruction 38 (C.T. 120, R. 1020): This advised the jury that Lessig "also claims that he and Tidewater were parties to an illegal tying agreement" and "Specifically he claims that Tidewater

eased the service station to him and agreed to sell gasoline to im only on his agreement to buy substantial quantities of TBA rom it". At the instruction conference the following occurred (R. 931):

> "The Court: . . . Is 38 an accurate statement of your claim?
>
> Mr. Keith: *That is correct. I have no objection to that.* It is understood unless—(remarks inaudible to the reporter). I would rather have 'upon condition', but I won't make much point about it."

Having told the court that instruction 38 accurately stated his laim, it was too late for counsel to object that it was "an incorect statement" and that "What we do claim is that in order to et a station we had to agree to buy TBA and he was so instructed." R. 1035.

Nothing in instruction 38 is inconsistent with the theory that essig "had to agree", for whether or not he "had to", the claim vas that he did become a party to an agreement. Conversely, if it s now argued that Lessig did *not* claim an *agreement,* the TBA laim vanishes from the case because agreement is a *sine qua non* nder both Section 1 of the Sherman Act (*Nelson Radio & upply Co. v. Motorola,* 200 F.2d 911, 914 (5 Cir.), cert. den. 45 U.S. 925) and Section 3 of the Clayton Act. *Leo J. Meyberg o. v. Eureka-Williams Corp.,* 215 F.2d 100 (9 Cir.); *McElhenney o. v. Western Auto Supply Co.,* 269 F.2d 332, 338 (4 Cir.). Moreover, the jury was fully aware of Lessig's claim that he was forced" to agree. In lodging objection to this instruction counsel aid: "the claim is that we were required to order to obtain the ease—However, *you did cover that in your instructions based pon the plaintiff's instructions".* R. 1036, lines 14-17.

Lessig's brief argues that this instruction raised a question of *ari delicto.* O.B. 60. It did no such thing. An instruction on *pari elicto* was requested by Tidewater and refused. C.T. 142. Instruction 38 gave no charge on the law, but merely described what essig was contending.

C. Relative to Damages.

Lessig complains of the refusal of his requested instructions 18, 19, 20 and 21. His contention is that the court "refused to allow the jury to base damages on the illegal lease cancellation" and "limited damages to the loss of profits made while plaintiff was on the premises." O.B. 35, para. (f). Thus no error is asserted about the damage instructions relative to his claim of "inability" to set his own gasoline prices or to buy TBA. Lessig confines this quarrel to the lease cancellation, and, as to that there is nothing to his contention.

As shown, the jury was instructed respecting the cancellation claim, and was told that a cancellation for the reason Lessig alleged would be illegal. *Supra,* pp. 5, 39-40. On damages, the court first read to the jury from 15 USC § 15 authorizing the recovery of damages by anyone injured in his business or property by reason of *anything* forbidden by the antitrust laws. R. 1006-1007. It then gave instructions dealing with damages allegedly suffered on account of the TBA and price-fixing claims. R. 1021, lines 9-24. But the instructions did not stop there. The very next instruction given was (R. 1021, 1022):

> "The purpose of the law of damages is to place a party in as good a position as he would have enjoyed but for the wrong done."

This advised the jury that Lessig should be awarded any damages suffered as a result of an illegal cancellation as is apparent from Lessig's brief, when he states (O.B. 117):

> "The purpose of the law of damages is to place the party in as good a position as if the wrong had not occurred. As to Mr. Lessig *that rule would allow him the losses occasioned by the wrongful cancellation. . . .*"

Precisely so, and precisely so was the jury instructed. But even this is not the whole of it.

The jury was then instructed that "damages are proximately caused by illegal conduct whenever it appears that damages were either a natural or a reasonably probable consequence of such

legal conduct" (R. 1022), that in arriving at an amount "you hould *include* all damages suffered by the plaintiff because of ost profits" (Id.), and that the jury might find that Lessig had suffered damage to his business or property *such as* a loss in rofits." Ibid. The jury was then advised that in determining amages they "should consider all the evidence in this case" and *you may specifically base your award of damage . . . on the stimony of expert witnesses.*" R. 1023. Only two experts, Mr. Veiner and Dr. Vance, testified. Vance's entire testimony was irected to the question of losses suffered by Lessig as a result f the cancellation, and that portion of Mr. Weiner's testimony hich related to damages was a comparison of Lessig's earnings s a Tidewater dealer with his subsequent earnings. R. 843, . Exs. 104, 105. Indeed, during the examination of Mr. Weiner ie trial court stated, in the jury's presence, that "if Lessig ad any . . . legitimate complaint about the loss of prospec- ve earnings from the operation of the station during the pe- od that would have remained on the lease absent cancellation, s damage would be the difference between what he actually rned and what he could have earned had he retained posses- on of the station." R. 845. Thus, when the court in its damage struction specifically directed the jury's attention to the expert stimony, it meant only one thing, viz., that any damages proxi- ately caused by an illegal cancellation were recoverable. Im- ediately following this reference to the expert testimony, the urt reread 15 USC § 15 (R. 1023) and advised the jury that if mages were awarded they should be such as were "reasonably cessary to compensate the plaintiff for *any* injury to his busi- ss or property proximately cause by *one or more* of the viola- ns of the antitrust laws which the plaintiff has alleged." R. 023-1024.

There can be no doubt that the jury knew that Lessig was claim- g damages caused by a lease cancellation alleged to be illegal, d that they also knew that they could award such damages if ey found any to exist. Here, as elsewhere, Lessig's complaint is

simply that he could not put the precise language he desired int the trial judge's mouth.

IV. ANSWER TO MISCELLANEOUS CONTENTIONS.

A. The Trial Court Was Not Guilty of Misconduct.

The last resort of an appellant with a frivolous case is to attac the trial judge, and Lessig does so—an unwarranted attack on trial judge who, with remarkable patience, permitted Lessig t meander in all directions for nine days in a case which shoul have been tried in one-third that time, if not terminated by sun mary judgment before trial. Lessig asserts that the trial judg "weighted its charges" in favor of Tidewater (O.B. 63), he referring to the instructions heretofore discussed individually an in passing, to other instructions to which no objection was mac below.[46] Nothing is added by the epithet "exceeded the prop boundaries of judicial conduct." O.B. 80, 123. Lessig also charg the trial judge with "usurping the function of the jury" by inte rogating witnesses and making comments (O.B. 80), and hea up 28 instances of alleged misconduct. R. 16, 23, 29, 56-59, 75-7 96, 116, 127, 184-185, 204-205, 231, 272-275, 306, 311-312, 32 374, 399-400, 616, 622, 664-670, 674, 695, 723, 735, 777-77 807-808, 835-836, 878. O.B. 80-81. Yet *in only one instance did object.*[47] As stated in *Kettenbach v. United States,* 202 Fed. 37 384 (9 Cir.), cert. den. 229 U.S. 613, "This fact alone is sufficie to dispose of the contention which is made in this court."

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46. These are instructions 20 (C.T. 94, R. 1014), 21 (C.T. 95, 1014), a modified form of 22 (C.T. 96, R. 1015), 28C (C.T. 108, 1014), and the instructions on damages at R. 1021-1024. O.B. 64. It is a asserted that the cancellation claim was "made confusing and uninte gible" by the alleged "mixing" of instructions at R. 1009-1010 and 1013. O.B. 63, 64. In order to avoid extending this already long brief, do not discuss these claims, but rely on the settled rule that in a civil c the failure to object to an instruction below precludes attack here. *Su* p. 35, ¶ 1a.

47. The one objection was to an entirely proper question put t witness by the Court as "invading the province of the jury". R. 878.

Lessig has no conception of the function of a United States District Judge. As stated in the *Kettenbach* case, *supra,* at p. 385:

> "The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses."

Accord: *Jordan v. United States,* 295 F.2d 355, 356 (10 Cir.); *Ward v. Todd-Johnson Dry Docks,* 213 F.2d 864, 866 (5 Cir.); *Norwood v. Great American Indemnity Co.,* 146 F.2d 797, 801 (3 Cir.).

As for the trial court's interrogation of witnesses, we quote *Simon v. United States,* 123 F.2d 80, 83 (4 Cir.), cert. den. 314 U.S. 694:

> "*This is precisely what he should have done* . . . the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done . . . it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as himself. *He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or another.*"

Accord: *Griffin v. United States,* 164 F.2d 903, 904-905 (D.C. Cir.).

From time to time the trial court also sought, by questions to counsel, to ascertain the respective positions of the parties, and inquired as to the relevance and purpose of various lines of inquiry. This was both "wholly within the bounds of propriety" (*Russell v. Monongahela Railway Company,* 262 F.2d 349, 353 (3

Cir.)) and essential to enable both the Court and jury to unde stand the issues.

Precisely the type of attack made here was made with infinite more justification—and rejected—in *Union Carbide and Carbo Corporation v. Nisley,* 300 F.2d 561 (10 Cir.), an antitrust cas

> "The appellants complain generally of the instructions being weighted in favor of the appellees and against t appellants. They earnestly contend that rulings in the cour of the trial, together with his instructions, so influenced t jury so as to deprive them of a fair trial. There are, to sure, instances in the record in which the trial court indicat with some emphasis his view of the evidence, and even critical attitude toward counsel for appellants. And, it m be fairly said from the tenor of the whole record that t jury was impressed with the views of the court concerni the merit of the plaintiffs' case, and the demerits of t defendants' case. But, as we have recently said, 'a jud presiding over a * * * federal court is not a mere umpi He has both the responsibility of assuring the proper condu of the trial and the power to bring out the facts of the cas Jordan v. United States (10 CA—Sept. 1961), 295 F.2d 3 To that end, an expression of the court's views with resp to the evidence and conduct of counsel within proper lim is permissible, provided the jury is given to understand th they are free to form their own opinion of the facts a apply them to the law." (p. 586)

On the very first day of the trial the trial court stated to t jury (R. 65):

> "The function of the jury is to determine the facts of t case from the evidence as the jury weighs the evidence. T function of the Court is to give the law to the jury, to applied to the facts as the jury may determine the facts to If during the course of the trial any indication is given as my personal views of any evidence which comes in either the form of testimony or in the form of documentary dence, that is something which should be completely c regarded by you. There is no desire or intention on the p of the Court to intrude upon the sole responsibility of jury to find the facts in the case."

his principle was repeatedly stated in the instructions. The rors were advised that they were "the sole judges of the facts" R. 994), "the sole judges of the credibility of the witnesses and e weight their testimony deserves" (R. 998) and (R. 1004):

> "The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.
>
> "During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts."

hen followed the further admonition that, "as stated before, e jurors are the sole judges of the credibility of all witnesses and e weight and effect of all evidence." R. 1005.

The Claims About Monopolization.

Lessig claims error in the giving of Instructions 37 and 46 about onopolization. What Tidewater is supposed to have attempted t monopolize has never been made clear, either in his Complaint, i his Pre-Trial Statement of Contentions, or now, in his brief. Some vague and curious notions of law seemed to be entertained, hich it would be of academic interest to dissect, but it would be a imposition on the time of the Court to do so, *because the jury's rdict made the subject moot.*

Instruction 46 (R. 1008) told the jury that Tidewater had not onopolized or attempted to monopolize trade or commerce. Lessig's basic fallacy in discussing the subject is to forget that no ssible violation of law by Tidewater is a concern of his unless inflicted damage on him. *Simpson v. Union Oil Company,* ..... Fd ..... (9 Cir.), 1963 Trade Cases, para. 70,612, p. 77,506. ere the jury's verdice negatived *everything* by which Lessig aimed to have suffered damage. Its verdict found that Tidewater

(1) did *not* limit the prices at which he sold gasoline, (2) did *no* limit or prevent him from obtaining TBA wherever he wished (3) did *not* cancel his lease for any improper reason, and (4) in flicted *no* damage on him at all. Assuming that somewhere in th ambient blue Tidewater attempted to monopolize some product— unspecified by Lessig—in some market—also unspecified by him— it had no consequence on him.[48] That is the end of the matter.

Lessig's criticism of Instruction 37 fails for the same reaso Indeed, it is even weaker—if that were possible. Instruction 37 (R 1019) told the jury that "there is no evidence in this case fro which you could find that the effect may have been to tend to creat a monopoly in TBA for Tidewater." But the instruction then co tinued, *explicitly,* to put to the jury the issue whether the effe may have been to "substantially lessen competition in TBA." Th jury's verdict found there was no such possible effect. This nece sarily found no tendency to monopolize. There may be "a substa tial lessening of competition" without reaching the point monopoly, but there never can be monopolization which does n constitute a substantial lessening of competition. The lesser viol tion is a necessary component of the greater and the jury havi found the nonexistence of the lesser, Lessig has not been prej diced by an instruction that there was no evidence of the greate The objection made by Lessig to Instruction 37 when it was giv was *not* that it was incorrect, but that it "has a prejudicial effe on the plaintiff" (R. 1035). On the contrary, the only "prejudici

48. Attempt to monopolize requires a dangerous probability of succe i.e., that if unchecked, monopolization will result. *Sunkist Growers, I v. Winckler & Smith Citrus Products Co.,* 284 F2d 1, 26 (9 Cir.). though this is conceded by Lessig (O.B. 117), his proposed instruction the subject (No. 13, C.T. 183) wholly ignored this requirement. Inqu about the probability of monopolization cannot even begin without spe fication of the goods or services involved and what is the "relevant marke *United States v. Du Pont & Co.,* 351 U.S. 377, 380. Lessig's brief vagu states that Tidewater "possesses the dangerous probability" because "it 6.5% of the West Coast market." O.B. 117. Not only is "West Coast m ket" not defined in the record, but the 6.5% relates to gasoline sold the entire West Coast. But there has never been any claim in this case t Lessig suffered any damage relative to gasoline except from inability set his resale prices and, inconsistently, from cancellation of his lease cause he did set his own price, and the jury negatived each of these clai

ffect" it could have had was in favor of Lessig because by its ontiguous but different treatment of "tendency to monopolize" nd a possibility of a mere substantial lessening of competition, he jury was vividly told that it could find a violation of the law n the basis of evidence showing a lesser restraint of trade than ight otherwise have been assumed.[49]

Conclusion

Lessig had a full and fair trial. His claims were utterly without oundation, and sham on his own testimony. Despite his attempts o inflame the jury against a large oil company by thrusting into he record evidence of alleged mistreatment of other Tidewater ealers which he knew he could not relate to himself, the jury eturned a verdict for Tidewater. That verdict was correct and he judgment should be affirmed.

Respectfully submitted,

MOSES LASKY
RICHARD HAAS
BROBECK, PHLEGER & HARRISON

Attorneys for Appellee
Tidewater Oil Company

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49. It may be superfluous to note that Lessig's citations are wholly relevant, involving cases where the defendants, by conspiracy, controlled rge shares of the delineated market. *Continental Co. v. Union Carbide,* 70 U.S. 690, 698 ("99% of the ferro-vanadium and vanadium oxide sold n this county"); *United States v. Yellow Cab Co.,* 332 U.S. 218, 224 "86% of the Chicago market, 15% of the New York City market, 100% f the Pittsburgh market and 58% of the Minneapolis market"); *American obacco Co. v. United States,* 328 U.S. 781, 796 ("over 68% of all domes- c cigarettes . . . over 63% of the smoking tobacco and over 44% of the hewing tobacco."); *Times Picayune v. United States,* 345 U.S. 594, 612 "around 40%); *Union Carbide and Carbon Corporation v. Nisley,* 300 .2d 561, 573 (10 Cir.) ("almost 100% of the ferro-vanadium market"); *Inited States v. Eastman Kodak Co.,* 226 Fed. 62, 79 (W.D.N.Y.) "between 75 per cent. and 80 per cent. of the entire trade"). Neither .T.C. *v. Beech-Nut Packing Co.,* 257 U.S. 441, nor *Klor's v. Broadway- ale Stores,* 359 U.S. 207, has anything to do with attempts to monopolize. he former deals with resale price maintenance and the latter with group oycotts, both denounced by Section 1. As noted, *supra,* p. 51, there is no vidence of Tidewater's share of TBA sales in any market.

I certify that, in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD HAAS

No. 17,924

IN THE

United States Court of Appeals

For the Ninth Circuit

PAUL LESSIG,
Plaintiff-Appellant,

vs.

TIDEWATER OIL COMPANY,
Defendant-Appellee.

MOTION FOR PERMISSION TO FILE A STATEMENT AMICI CURIAE IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING, AND STATEMENT AMICI CURIAE

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To The Honorable Frederick G. Hamley, J. Warren Madden and James R. Browning, Judges of the United States Court of Appeals for the Ninth Circuit:

As friends and attorneys of the Court, the undersigned respectfully request permission to file the following statement in support of the petition of Appellee for rehearing in this matter.

This motion is filed because the opinion of the Court, upon the basic meaning and administration of section 2 of the Sherman Act (15 U.S.C. 2), is not in accord with other decisions of this Court, or other courts of appeals and of

the Supreme Court of the United States. We confine our statement to this single point in the Court's opinion which is of primary importance to the bar and the public.

Dated: February 3, 1964.

Respectfully submitted,

JOHN A. SUTRO,
FRANCIS R. KIRKHAM,
PILLSBURY, MADISON & SUTRO,
Amici Curiae.

STATEMENT

That portion of the court's opinion to which we respectfully urge its particular attention is as follows:

> "The essence of monopoly power is power to control prices and exclude competition and what we have said demonstrates that there was * * * specific intent to acquire and exercise *such* power with respect to a part of commerce." (pamphlet opinion p. 20)
>
> * * *
>
> "When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'" (pamphlet opinion page 21)

On September 6, 1963 this court in *Walker Distributing Co. v. Lucky Lager Brewing Co.* (9 Cir. Sept. 6, 1963) CCH Trade Cases par. 70,886 page 78,565 held to the contrary:

> "We do not think either count states a sufficient claim under section 2 of the Sherman Act, which makes it illegal to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . .' . . ."
>
> "Nowhere is there any allegation, direct or indirect, that the purpose or effect of the charged conspiracy is to monopolize, or that Lucky has monopolized or attempted to monopolize the beer market. For all that appears, there may be any number of other beers being sold in the market involved, however it may be defined, and by any number of distributors. Nothing whatever is said about Lucky's position in the market in question. It is not enough that Lucky be one of the largest manufacturers of beer in the west. That tells us nothing of its market position or power in

> the territory where the conspiracy is claimed to operate."

On July 16, 1963, this court held that monopoly power "depends upon the degree of control the defendant could exert in a particular market" (*Independent Iron Works, Inc. v. United States Steel Corp.* (9 Cir. July 16, 1963) 5 CCH Trade Reg.Rep., par. 70,848, p. 78,440) and further held:

> "* * * [P]laintiff was required to produce proof that a defendant's acts were not 'predominantly motivated by legitimate business aims' [*Times-Picayune Publishing Co. v. United States* [1953 Trade Cases [par.] 67,494], 345 U.S. 594, 626-27 (1953)], but instead were done in order *to gain monopoly power*" (emphasis added).

An attempt to monopolize necessarily requires, as an object, a market and the exercise of market power. In *American Tobacco Co. v. U.S.* (1946) 328 U.S. 781, 785, the Supreme Court approved an instruction to the jury that an attempt to monopolize "means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which though falling short, nevertheless approach so close as to create a dangerous probability of it" (p. 785).

On December 23, 1963, the Court of Appeals for the Second Circuit held with respect to attempted monopolization that a market constituting an "appreciable part" of interstate commerce must necessarily be involved (*Rock of Ages Corp. v. H. E. Fletcher Co.* (2 Cir. Dec. 23, 1963) 5 CCH Trade Reg.Rep., par. 70,979, p. 78,893):

> "Although that section [section 2 of the Sherman Act] condemns actual or attempted monopolization of 'any part of the trade or commerce among the several States, or with foreign nations,' it is settled that this means a market constituting 'some appreciable part.' "

In *American Football League v. National Football League* (4 Cir. Sept. 23, 1963) 323 Fed.2d 124, 132, footnote 18, the court held:

> "It is elementary that in order to find the offense of conspiracy or attempt to monopolize, there must be a specific, subjective intent to gain an *illegal degree of market control.* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 73 S.Ct. 872, 97 L.Ed. 127; United States v. Griffith, 334 U.S. 100, 105, 68 S.Ct. 941, 92 L.Ed. 1236; American Tobacco Co. v. United States, 328 U.S. 781, 814, 66 S.Ct. 1125, 90 L.Ed. 1575; Swift & Co. v. United States, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518" (emphasis added).

Similarly, in *Ace Beer Distributors, Inc. v. Kohn Inc.* (6 Cir. June 11, 1963) 318 F.2d 283, certiorari denied November 18, 1963, rehearing denied January 6, 1964, 32 U.S. Law Week, pp. 3185, 3244, the court held in an attempt to monopolize case that the complaint did not state a cause of action when it was restricted to one brewer's product.

This Court's holding in the case at bar that when the charge is attempt to monopolize the relevant market is not in issue, appears to place in jeopardy of prison sentence every businessman who competes with the purpose

of displacing his competitor for the particular business for which he and his competitor are competing. If the relevant market is not an issue and a specific "intent to monopolize," i.e., to capture all of some subject matter of competition, is all that is required, then every competitive attempt to sell to any single customer constitutes an attempt to monopolize.

We respectfully submit that this Court cannot intend such a drastic change in the law and that appellee's petition for a rehearing should be granted.

Dated: February 3, 1964.

Respectfully submitted,

JOHN A. SUTRO,
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Amici Curiae

17924

In the

United States Court of Appeals

For the Ninth Circuit

PAUL LESSIG,
Appellant,

vs.

TIDEWATER OIL COMPANY,
Appellee.

Petition of Appellee for Rehearing and Suggestion for Rehearing En Banc Pursuant to Rule 23

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No. 17924

In the

United States Court of Appeals

For the Ninth Circuit

PAUL LESSIG,
Appellant,

vs.

TIDEWATER OIL COMPANY,
Appellee.

Petition of Appellee for Rehearing and Suggestion for Rehearing En Banc Pursuant to Rule 23

We assign the following grounds for this petition.

1. Final Decision Should Await the Supreme Court in Simpson

Simpson v. Union Oil Company, decided by this Court, 311 F.2d 764, was submitted to the Supreme Court two weeks ago. Simpson's counsel, who is Lessig's, there argued that the decision here is inconsistent with this Court's decision in *Simpson.* A rehearing should be granted so the case may await the Supreme Court's word. The decision here does ignore this Court's decision in *Simpson.* Because a decision of one panel can be overruled only en banc (*Ellis v. Carter,* 291 F.2d 270, 273 (9 Cir.)), we pray a rehearing en banc.

Lessig's claim that "he was unable" to establish his own gasoline prices was made by Simpson, and Lessig's claim that "he was unable" to purchase TBA is similar. And Lessig claims to have lost a service station for the same reason that Simpson did. Yet, the opinion's entire discussion of *Simpson* is that: (a) with respect to the resale price maintenance claim, *Simpson* "may have" relevance (Op. 4, f/n 7); (b) with respect to the TBA claim one should "see" *Simpson* (Op. 15, f/n 28); and (c) with respect to the cancellation claim, *Simpson* "has no bearing". (Op. 4, f/n 7). But in the Supreme Court counsel relied on the decision here as overruling *Simpson* in these respects. In fairness to the bar, the Court should make its views of *Simpson* clear.

2. Appellant's Instruction 18 Is Erroneous

Reversal is ordered for failure to give Lessig's Instruction 18. (Op. 5, 6). Whatever may be said of the first sentence of the instruction, the second* is a flat permission to the jury to award damages on the facts of the case *without the necessity of any finding of wrongdoing, (or even damage†)* a direction of verdict

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*"If you find that Paul Lessig had developed net income and profits at the service station * * * [while there], and there was reasonable likelihood that such earnings and profits would have continued in the future you may award as damages the value of such future profits as of the date of cancellation."

†By permitting the jury to ignore Lessig's subsequent earnings.

for plaintiff as Judge Madden points out. Yet the opinion does not even face this fact. Surely, it commands reconsideration.

3. The Decision's Treatment of Attempts Is Revolutionary

The decision's treatment of "attempt" is revolutionary and stunning. It means that any business man's effort, *however unsuccessful, however hopeless of attainment,* to obtain any share, *however proportionately small,* of the market for a product, *however vast the market,* is an "attempt" "to monopolize" a "part of commerce" and therefore illegal! If so, every businessman of necessity always violates the law, and the most elementary acts of competition are illegal, for the essence of competition is the effort to gain a share of the market. Thus an Act designed to protect competition paralyzes it. Yet the decision's treatment of the subject, opening enormous vistas of liability to all industry, is cursory. So important a departure deserves a hearing en banc.

The decision casts out basic prerequisites of "monopolization" and "attempts". As the reason the law punishes "attempts" is to discourage crimes, there is no sense to punish a mere effort where it is apparent that attainment of the goal would be no crime. Suppose Tidewater actually succeeded *both* in fixing the retail price of its own brand of gasoline in 2700 service stations and in becoming their sole supplier: would it be guilty of monopolizing? True, if it did so by *conspiracy,* it might violate Section 1 of the Sherman Act; or if it did so by tying or exclusive dealing arrangements, it might violate that Section or Section 3 of the Clayton Act. But these elements play no part in the Court's treatment of *this* part of the case.

First, relevant market *cannot* be ignored. In *Brown Shoe,* 370 U.S. 294, where the Supreme Court seized the opportunity to illuminate the whole field, it emphasized (p. 324):

> " '[d]etermination of the relevant market is a *necessary predicate* to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition *"within the area of effective competition.'* " * * *
>
> "The 'area of effective competition' *must be* determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')."

And this was a total endorsement of the discussion in the Report of the Attorney General's National Committee.*

The Court's opinion departs from settled law by holding that the "relevant market" is not relevant to a charge of "attempt to monopolize". This result it reaches by (a) assimilating "attempts" to conspiracies and (b) observing that Section 2 prohibits attempts to monopolize "any part" of commerce, by giving to "any part" the literal sense that *Brown Shoe* rejected. This interpretation of "any part" is in direct conflict with the recent *Rock of Ages Corp. v. H. E. Fletcher Co.,* 1963 Trade Cas. ¶ 70,979, (2 Cir.):

> "Although that section [§ 2] condemns actual *or attempted monopolization* of 'any part of the trade or commerce . . .', it is settled that this means *a market* constituting 'some appreciable part.' "

This Court introduces into "attempts" the discredited concept of "quantitative substantiality" after it has been expelled from the ¶ 3 Clayton Act field (*Tampa Electric,* 365 U.S. 320). The words "any part" are used in the same sentence of the Act relative to "attempts" and "to monopolize". They cannot mean one thing applied to "monopolize" and another when applied to "attempt to". Were this Court's view sound, the elaborate discussion of the relevant market in *U. S. v. Columbia Steel,* 334 U.S. 495 would be pointless.† And the assimilation of "attempt"

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*". . . the concept of 'the market' . . . is integral to the basic concept of 'monopolization,' and the ideas of competition and monopoly on which it rests. Thus, Section 2 . . . deals with monopolizations affecting *markets* which constitute 'any part' of the trade or commerce covered by the Act. To be sure, an appreciable amount of commerce is a 'part' of commerce, but control over an appreciable amount of commerce does not necessarily mean control over an identifiable market which constitutes an appreciable part of commerce." (p. 47).

* * * * * * *

"Sometimes the part of commerce affected by the defendants' conduct will aso be a market; but this does not necessarily follow. *Without a finding as to the market involved, there is no way of determining whether or not the defendants have a given degree of market power.*" (p. 48).

†In footnote 23 to the *DuPont* case the Supreme Court did *not* state the principle attributed to it by the Court at Op. 21. It noted that *Story Parchment* was a conspiracy case and continued:

> "this Court found in *United States v. Columbia Steel Co.,* 334 U.S. 495, that the 'relevant competitive market' for determining whether there had been an unreasonable restraint of trade *(or an attempt to*

to "conspiracy" was shown to be unsound by Justice Holmes in *Hyde v. United States,* 225 U.S. 347, 387:

> "An attempt, in the strictest sense, is an act expected to bring about a substantive wrong by the forces of nature. With it is classed the kindred offence where the act and the natural conditions present or supposed to be present are not enough to do the harm without a further act, but where it is so near to the result that if coupled with an intent to produce that result, the danger is very great. *Swift & Co. v. United States,* 196 U.S. 375, 396. But combination, intention and overt act may all be present *without amounting to a criminal attempt*—as if all that were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. There must be dangerous proximity to success. * * * *"On the other hand, the essence of the conspiracy is being combined for an unlawful purpose*—and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it;"

This passage also shows the **second** revolutionary aspect of the decision—its rejection, as an essential of an "attempt to monopolize," of the **dangerous probability of success.** Yet, in *American Tobacco Co. v. U. S.,* 328 U.S. 781, 785, 815 an instruction embodying that element was specifically approved. *Swift & Co. v. United States,* 196 U.S. 375, is not to the contrary. Justice Holmes wrote the opinion in *Swift,* and we have quoted his understanding as stated in the later *Hyde* case. See *Attempt to Monopolize: Its Elements and Their Definition,"* 27 Geo. Wash. L. Rev. 227, 230, 233; *Centanni v. T. Smith & Son, Inc.,* 216 F.Supp. 330, 339, affd. per curiam 323 F.2d 363 (5 Cir.); *Mackey v. Sears, Roebuck & Co.,* 237 F.2d 869, 873 (7 Cir.); *McElhenny Co. v. Western Auto Supply Co.,* 269 F.2d 332, 339 (4 Cir.)

Third, one cannot be guilty of monopolizing his own brand. *United States v. E. I. Du Pont De Nemours & Co.,* 351 U.S. 377,

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monopolize) was the market for 'rolled steel' products in an 11-state area." (351 U.S. at 396)

Conspiracy cases are not in point, because "in a charge of conspiracy to monopolize, no act other than the act of conspiring is required to be proved, for the reason that the Sherman Act punishes conspiracies at which it is aimed, on the common law footing." *American Tobacco v. U.S.,* 147 F.2d 93, 111 (6 Cir.); *Attempt to Monopolize,* 27 Geo. Wash. L. Rev. 227, 240.

393. As held in *Nelligan v. Ford Motor Co.,* 262 F.2d 566, 557 (4 Cir. 1959), an *attempt to monopolize* only the market represented by one's own dealers of its own line is not a violation.

4. The Decision States Erroneous Rules Re Proof of Damages

The opinion states that evidence that a merchant has been required to pay more for the "goods which he resells" is evidence that he has been damaged (Op. 15). Even if true of goods of the same make, this statement is not true of goods merely of the same general type. The question is one of common experience, not legal concepts. Ordinarily, the higher the wholesale price of an item the *greater* the profit realized by the retailer.* "Common experience" does *not* "establish with reasonable probability" or even suggest that I. Magnin's profit on the resale of a dress which cost it $100 is less than its profit on a dress which cost it $50 or that one brand of tires will command as high a retail price as another. *Just the opposite is true.*† Further, the opinion errs in saying that Lessig could not produce pertinent evidence because, *arguendo,* Tidewater prevented him from dealing in competitive TBA; testifying that some off-brand batteries were cheaper (Op. 16, f/n 33), he testified that he bought them. (R. 726).

CONCLUSION

We respectfully pray that the petition be granted.

MOSES LASKY
RICHARD HAAS
Attorneys for Appellee

**Osborne v. Sinclair Refining Co.* involved Firestone and Goodyear, two equally well-known lines customarily selling at the same retail prices. Defendant *agreed* that plaintiff was entitled to recover the difference in wholesale cost, (207 F.Supp. 856, 858), and did not contest this award on appeal (1963 Trade Cases Para. 70,940 at p. 78,744.)

†The opinion states that the "passing on" cases are, "of course," inapplicable. (Op. 15, f/n 30). But why is this so when the very nature of Lessig's retail business was merely to pass on his costs after adding a profit for himself? *Freedman v. Philadelphia Terminals Auction Co.,* 301 F.2d 830, 833 (3 Cir.). The law and the bar deserve an explication if bewilderment is to be avoided.

I certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

MOSES LASKY

No. 17929

In the

United States Court of Appeals

For the Ninth Circuit

MILLER & LUX INCORPORATED,
Appellant,

vs.

A. L. CHICKERING, et al.,
Appellees.

Appellant's Reply Brief

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Appellant's Reply Brief

INTRODUCTION

Appellant here, as in its opening brief in this appeal, adopts by reference* its argument in its brief in *Miller & Lux Incorporated v. R. H. Anderson, et al.,* No. 18033, concerning dismissal of the action for failure to state a claim and for failure to join indispensable parties. (See Anderson Reply Brief, pages 1-34.) In addition, however, it presents a further discussion which is intended to treat contentions which are more or less unique (either by subject or by emphasis) to the appellees in this action. It will then devote the remainder of its discussion to the application to defendants Chickering, Blyth and Fair of Rule 25(a) of the Federal Rules of Civil Procedure.

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*Under leave granted by order of this Court on August 21, 1962.

PART I.

THE COMPLAINT PROPERLY STATES A CLAIM AND ITS DISMISSAL CANNOT BE JUSTIFIED

A. There Was No Corporate Knowledge and Approval of This Conspiracy.

Appellees attempt to show that Miller & Lux Incorporated had knowledge and approved of these frauds despite the complaint's allegations of corporate captivity (Para. XL, XLI, R. 455-6) and of no ratification (Para. XVI, R. 88-89).* First, they say as do appellees in No. 18033, that the knowledge of the guilty trustee-shareholders must be imputed to their victim corporation. To this, we merely refer the Court to our statements in the briefs in No. 18033 (Anderson Opening Brief, pages 19-45; Anderson Reply Brief, pages 18-19). Secondly, they point, as do appellees in No. 18033, to some sort of notice that the corporation should have had from its books and records. This is discussed in the briefs in No. 18033 (Anderson Opening Brief, pages 45-55; Anderson Reply Brief, pages 18-19) and we will say no more. Thirdly, they argue that the complaint indicates that the corporation was given notice of these frauds in 1939 and that the statute of limitations for fraud began to run against *all* defendants from such time. They avoid discussing the fact, however, that the very directors who they say took such knowledge for the corporation are charged in this complaint with participation in the conspiracy (Para. XXIX-XXIX-F, R. 99-109) or with having been dominated (Para. XL-XLI, R. 113).

The essence of appellees' argument on this score is that M. C. Sloss could not *be proven* to have been either a conspirator or to have been dominated (e.g. Blyth/Fair brief, pages 2-4; Bank of California brief, page 45) despite appellant's allegations that he was (Para. XL-XLI; R. 113). If there is an issue of fact here

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*The question of corporate knowledge of the participation of *these* defendants in the conspiracy (as opposed to the participation of those named in No. 18033) is discussed infra.

let it be litigated. Appellant has not the slightest fear of full litigation of any of the factual issues which may arise out of this complaint. *It is not appellant who has consistently resisted a trial on the merits;* it is only these appellees who attempt to obtain rulings on questions of fact on these motions to dismiss.

B. Appellees' Conduct in 1939 at Best Raises a Fact Issue Which Cannot Be Decided on Motions to Dismiss the Complaint.

The long elaborate argument presented by appellees for the proposition that the transactions in 1939 constituted knowledge to the corporation of these frauds and of the general conspiracy are completely irrelevant. This is a factual argument which is refuted by the allegations in this complaint and it is to the allegations alone that the Court is entitled to look.

Appellees, however, claim that appellant has made "admissions" in its complaint which contradict its allegations of corporate captivity. Their argument rests on the transactions in 1939 when the defendants in this complaint obtained knowledge of the Nickel-Houchin frauds in the Buena Vista Lake area. (See Para. XXIX-XXIXF; R. 99-109; see also Exhibits A, B, C, D; R. 202-210). While appellees contend now that their action was perfectly regular and that they "thoroughly" (Blyth/Fair Brief, page 3) considered the reports of the Nickel-Houchin frauds, the allegations of this complaint permit no such conclusions (Para. XXIX-C; R. 105).

To hear the appellees discuss the matter one would almost think that they themselves had made a full investigation not only of the Nickel-Houchin dealings but of all else alleged in this complaint. In truth, they merely sat back and permitted J. Leroy Nickel, Jr. to serve as chairman of the meeting at which they conducted this "thorough investigation" (Para. XXIX-B; R. 104-5). They just sat back and heard Fickett piously declare that there was nothing really wrong with fiduciaries buying up the land of Miller & Lux under the circumstances which were de-

scribed in the draft minutes of the Funded Debt Protective Committee (Exhibit A; R. 202) and now in this complaint. They just sat back and were content to make no bona fide inquiry into frauds which reportedly had diverted over $10,000,000 from Miller & Lux in the Buena Vista Lake area alone. It may be suggested that appellees' rosy description of the happenings in 1939 is less than accurate.

Appellant will not pursue this further. It merely suggests that the activities of Chickering, Blyth, Fair, Hunter and the Bank of California in 1939 are, at the very least, so questionable that no court is permitted to hold on motions to dismiss the complaint that they were *not* fraudulent as a matter of law. This is, at best, a fact issue which cannot be decided prior to full hearing of the case on the merits. As all disputed facts must, on motions to dismiss, be resolved in favor of the pleading party (here, appellant) the District Court could *properly* find only that, as alleged (Para. XXIX-E; R. 106-7), these activities in 1939 were intended to suppress an investigation and thereby conceal the conspiracy. They were the acts by which these defendants joined the conspiracy.

C. Appellant's Cause of Action as to These Defendants Did Not Accrue Under Section 338(4) Until 1957.

Section 338(4) of the California Code of Civil Procedure provides a three year statute of limitation for

> "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The cause of action against *these* defendants* then, could not accrue until 1957 when the draft minutes of the Funded Debt Protective Committee (Exhibit A to Complaint, R. 202-206) were surrendered to appellant. Having been concealed in the files of

*As opposed to the defendants named in No. 18033.

appellee Chickering or his attorneys until that time (Para. XXIX, XXIXE, XLVI; R. 104, 107, 116) there was no way of appellant knowing of the participation of these defendants in the frauds and the conspiracy. Until that date all that appellant could have known (had it not been dominated) appeared in the innocuous minutes of the Directors (Exhibits C, D; R. 208-210).

Appellees suggest that the cause of action as to these defendants arose when they left the Board of Directors of Miller & Lux, citing *Coombes v. Getz,* 217 Cal. 320, 18 P.2d 939 (1933). But *Coombes v. Getz* is utterly inapplicable. We have discussed this subject adequately in our reply brief in No. 18033 (Anderson Reply Brief, pages 20-22) and we will merely invite the Court to refer to that discussion.

Appellees in this matter also suggest that appellant had notice of the frauds of these defendants the moment that the first impartial trustee-shareholder was appointed following the litigation to remove Nickel and Woolley and Olsen in June 1954. But this argument defeats itself. The new trustee-shareholders had no authority to undertake any corporate investigation to ascertain the existence of a corporate cause of action and they had no authority to file a corporate complaint in the absence of a refusal by management to do so. This was a duty of the new directors and officers.

As has been said earlier, discovery of the fraud of *these* defendants could not have been made because of the concealment by one of them of the draft minutes. The earliest date on which the statute of limitations could begin to run would necessarily be in 1957—the date on which those minutes were released to appellant. But, *in any event,* the statute could not run until there was an impartial directorate and management of the corporation and that date was July 22, 1954—clearly less than three years from the date this complaint was filed (R. 3).

Appellees also offer a half-hearted suggestion that appellant's captivity ended when George W. Nickel, Jr. undertook an investigation in April-June 1954. It was this investigation which

led eventually to the litigation to have Nickel, Woolley and Olsen removed as trustees in June 1954. But it is ridiculous to contend that any activity of George W. Nickel, Jr. was "corporate" activity and that his knowledge (whatever it may have been) was "corporation knowledge" for at the time he was neither director nor officer of the corporation and he was not, and never had been, a trustee-shareholder of the corporation.

It should also be mentioned that appellees contend that nothing consequential appears in the draft minutes of the Funded Debt Protective Committee (Exhibit A to the Complaint, R. 202-206) that does not also appear in the final minutes* (Exhibit B to the Complaint, R. 206-208) or the minutes of the Board of Directors of Miller & Lux. To this argument of fact (totally improper on motions to dismiss) we merely request the Court to reread these draft minutes and compare them with the minutes of the directors (Exhibits C, D; R. 208-210). These exhibits do *not* show as a matter of law that there was a full investigation and that there was a bona fide "ratification". This Court cannot possibly hold that these exhibits *refute* as a matter of law appellant's contention that the directors' activities in 1939 were acts which suppressed a proper investigation and further concealed the existence of the conspiracy (Para. XXIX, R. 99).

D. The Houchin Settlement Has No Effect on This Litigation.

Appellees argue that the settlement of the corporation's claim against C. E. Houchin† precludes any recovery against them as the recovery would be a "double recovery" (Blyth/Fair Brief, page 41). The theory is that the *only* frauds which were brought to the attention of these defendants were the Houchin-Nickel frauds reported in 1939 and that as Houchin has settled, any recovery from appellees would constitute a double recovery by Miller & Lux. This, of course, is not so. These appellees are

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*Which were of course not corporate records.

†Anderson Record, page 360.

charged with participation in the entire conspiracy, not merely the Buena Vista Lake, Houchin-Nickel self-dealing.

The conspiracy with which these appellees are charged did not end when the Nickel-Houchin conveyances were complete. As a matter of fact the conspiracy continued well past 1939. And as a matter of law it continued as long as the conspirators pursued their active concealment of their frauds. The fraud of these directors and treasurer may have been directed initially at the Buena Vista Lake transactions, reported in 1939. But the conspiracy which they aided and in which they participated was not so limited.

PART II.

THE DENIAL OF APPELLANT'S MOTION TO SUBSTITUTE WAS ERROR AND AN ABUSE OF DISCRETION

A. The Authorities Construing Rule 25a.

Appellant in its opening brief discussed the provisions of Rule 25a and appellees' interpretation of it as applied to the case at bar. Little is left to be said. Appellees have answered but their argument is not geared to the facts of this case. They discuss situations where the moving party failed to present its motion to substitute within the two-year period (*Anderson v. Yungkau,* 329 U.S. 482 (1947)) and situations where the motion to substitute was not made until weeks before the running of the two-year period (*Fleming v. Sebastiani,* 161 F.2d 111 (9th Cir. 1947)) and situations where Rule 25d was held to be constitutional (*Crescent Wharf & Warehouse Co. v. Pillsbury,* 259 F.2d 850 (9th Cir. 1958)). But no where do they provide even the slightest support for their proposition that mere passage of the two-year period of Rule 25a operates in all circumstances to prohibit substitution—including circumstances where the delay is attributable to no one but the Court itself.

It should be noted, in this respect, that despite repeated eferences (See e.g. Chickering Brief, pages 31, 32, 36, 40, 41) o *Iovino v. Waterson,* 274 F.2d 41 (2nd Cir. 1959) appellee

Chickering does not even mention that the Second Circuit expressly permitted substitution *where the motion was not filed until after the expiration of the two-year period.* It held that the party sought to be substituted was estopped to raise the defense. Yet appellee Chickering states that the two-year limitation is "jurisdictional" and that when the second anniversary of the defendant's death occurred, his estate gained an absolute immunity.

Even where appellees do admit that the Court in *Iovino* permitted substitution after the expiration of the two-year period (see Blyth/Fair Brief, page 14) no satisfactory explanation is offered why the Rule should be jurisdictional to some moving parties but not to others. No where do appellees explain why the plaintiff in *Iovino* was to be protected but this plaintiff in this case is not. If *Iovino* means anything, and appellees cite it throughout their briefs, then the stipulation prepared by counsel for the executor of Blyth, under which the District Judge was to set the motion for hearing, estops the executor from now relying to any extent on the two-year delay. We have discussed this in our opening brief (Page 30) and we invite the Court to reread that argument.

B. The Advisory Committee and Rule 25a.

As we said in our opening brief (page 35) *Perry v. Allen,* 239 F.2d 107 (5th Cir. 1956) saw clearly the inherent danger in the interpretation of Rule 25a which is urged by appellees. The very patronizing argument (Chickering Brief, pages 33-37, etc.) that Professor Moore "conjured up" (Chickering Brief, p. 33, line 26) his criticism of Rule 25a, and then somehow conjured up the decision of the Fifth Circuit in *Perry v. Allen, supra,* demands no reply. What does demand reply, however, is appellee Chickering's suggestion that the Advisory Committee's criticism of Rule 25a was considered and was rejected by the Supreme Court prior to the discharge of the Committee (see Chickering Brief, page 39).

The circumstances surrounding the discharge of the Committee are not in this record or in *any* record and appellee's insinuations ("... the Supreme Court had declined to accept the argument

and had discharged the Committee . . .") strain credibility. It may be suggested that if this Court is in the least bit interested in speculating on what was in the mind of the Supreme Court it would just as well find that no action was taken on the Committee's recommendations because for *other totally unrelated reasons*, the Advisory Committee was scheduled for changes both in personnel and in operation. It may be noted, of course, that the first recommendations of the newly formed Advisory Committee included revision of Rule 25a. The very language which is in dispute in this case was removed from the Rule. The Supreme Court approved the recommended revision and the new rule may be found at pages 13, 52 of the special section of 310 F.2d (unbound). The note of the Advisory Committee commenting on the amended rule cites the cases which are discussed by both appellant and appellees and recognizes their harshness. It would appear that Professor Moore's "conjured" criticism of Rule 25a has now found acceptance by the Supreme Court of the United States.

We suggest that what the Advisory Committee in its note recognizes as the "harshness" of *Yungkau*, and the other cases which it cites, would constitute more than mere "harshness" if they are held to be precedent applicable to *this* case. It would be "harshness" amounting to a denial of due process of law. For here there was no failure to file the motion to substitute within the two-year period as in *Yungkau*. Nor was there any failure to file the motion promptly as was the case in *Fleming*. Appellant did all that it could do and all that it was required to do under the terms of Rule 25a. The evils of Rule 25a, the evils which the recent amendment seeks to cure, are brought sharply into focus by the operation of the Rule on the facts of this case.

If it is held that these estates are lost to appellant as parties in this litigation it must be by this Court *extending* the now defunct Rule 25a far beyond where it has ever been applied before. Surely neither equity nor logic would be served by such a judicial eulogy to the inequity of the old Rule 25a.

C. The Effect of Appellees' Interpretation of Rule 25a on This Court's Appellate Jurisdiction.

Under appellees' interpretation of Rule 25a it follows as a matter of course that no matter how abusive or erroneous a District Court's handling of a motion to substitute, passage of the two-year period without an order granting substitution would be absolutely final. If the two-year period were to pass without any action by the Court (as in the case of Chickering and Blyth), or if there were denial near the end of the two-year period (as in the case of Fair), the moving party would have no effective remedy in the appellate process.

One appellee indeed reports in his brief (Blyth/Fair Brief, pages 19-20) the concern shown by this Court on the question of the two-year limit as it affected the Fair motion. The motion had been denied by the District Court on March 12, 1962. Judgment was entered March 30, 1962. The motion to dismiss the appeal was heard on May 21, 1962. The second anniversary of Mr. Fair's death was July 8, 1962.

To the best of appellant's knowledge, Judge Browning never suggested* that the Court could or would take any action to protect appellant before the expiration of the two-year period as to the Fair motion. Indeed, neither he nor any other judge ever suggested what remedy would be available. *And certainly appellees have never suggested what remedies were available.* The motion to substitute had been denied for reasons touching only on the sufficiency of the complaint. If dismissal of the complaint was improper, and appellant argues strongly that it was, then there is nothing left to support the denial of the motions to substitute.

The propriety of the denial of the motions to substitute could not be determined until both this case and No. 18033 were fully argued and decided. Does appellee Fair seriously suggest that under *any* acceleration of this appeal the record could have been

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*Appellant remembers Judge Browning's show of concern that the two-year period was about to expire as to Mr. Fair's estate but we cannot remember the exact discussion on this matter and we have been informed that the tape recording of it is not available for the use of the parties.

prepared by July 8, 1962?* Does it contend that the questions of these cases could have been briefed by July 8, 1962? It is to be pointed out that appellees in these two cases have found the questions on appeal to be so extensive as to require the filing of four briefs in this case and twenty-two briefs in No. 18033. Could those have been prepared by July 8, 1962? We need not point out that even if the record had been available and the parties had been physically capable of presenting their written argument before July 8, 1962, it cannot be suggested that the oral argument could have been heard and this Court's decision prepared and mandate issued all before July 8, 1962.

The Fair situation is, of course, but one of three in this case. Under appellees' interpretation of Rule 25a both the Chickering and Blyth estates gained complete immunity on the second anniversaries of Mr. Chickering's and Mr. Blyth's death. No appeal, under their view, could then be had regardless of the error or abuse of discretion of the District Judge.

Appellant cannot believe that a procedural rule of Court can thus defeat this Court's appellate jurisdiction.

D. The Delay in Acting on These Motions Can in No Way Be Attributed to Appellant.

Appellees suggest that there was something which appellant was required to do (see e.g. Blyth/Fair Brief, pages 6, 8, 13-18) and did not do, to assure prompt determination of the motions to substitute. Their argument is less than realistic.

What, for instance, was appellant to do with respect to the substitution of the executor of Mr. Chickering? His death occurred on January 6, 1958 and the motion to substitute his executor was presented to the District Court as promptly as could be desired (R. 38). It was argued by the parties and *it was taken under submission* by the District Judge on February 13, 1959 (R. 4, 518-546). Thereafter the parties were told by the judge that "a great

*As a matter of fact the first incomplete record in these cases was not delivered to this Court until *after* July 8, 1962 and was not printed until December 1962.

deal of work has been done" on the pending motions and that that work was "very near the process of conclusion" (R. 662). He stated that he wanted to "dispose of what I have before me" (R. 662). As these statements made on April 10, 1959, clearly indicate, appellant was entitled to believe that a decision on this motion to substitute (and on other pending motions) would be rendered in a short time or at least before the expiration of the two years on January 6, 1960.

The same is true with respect to the motion to substitute the executor of defendant Blyth who died on August 25, 1959 (R. 283). It had been filed on September 22, 1959, promptly after the rejection of appellant's claim on the estate (R. 332). And the District Judge led the parties to believe that this motion also was to be considered promptly. On April 14, 1960* Judge Carter announced that he was in the midst of an antitrust case but that he was going to "arrange his calendar" and would have time in about two weeks to hear arguments on the Blyth substitution motion (R. 666). He stated that he would set it down for argument "right away" (R. 666). The motion was not set for hearing, however, until Judge Wollenberg finally took charge of the case (after Judge Goodman had withdrawn) and it was not until January 1962 that a hearing was actually had (R. 478).

It has already been noted that these appellees who attempt to criticize appellant for not in some way forcing the District Court to determine the matters before it, fail completely to indicate just *how* that could have been done. We were told by the Chief Judge of that Court in early 1961 that it was necessary to transfer the case to himself as Judge Carter was too busy with other matters "which the Court had placed in his hands" (see Anderson Brief, page 9).

Had any remedy been available, to whom would appellant have addressed its request for action? To Judge Carter who was by the words of his own Chief Judge too busy to handle the matters

*After the filing of the stipulations prepared by appellee that the matter would be set *by the Court* for hearing (R. 291-293).

connected with this case? To Judge Goodman who withdrew after appellant's suggestion of a conflict of interest? (R. 7) To Judge Wollenberg who was not as yet assigned to the case? (R. 7) It may be suggested that appellees' "remedy" was a shallow one.

Furthermore, there was no duty for appellant to set itself up as a self-appointed watchdog of the District Court. There is no presumption that courts of the United States will not act promptly especially in the face of repeated assurances by the Court that its action would soon be forthcoming. Yet appellees suggest that such a duty did exist and that appellant is "negligent" and cannot complain when its cause of action as to these estates is threatened. Appellees contend that for these reasons a substantive right may be lost to a party engaged in litigation in federal court, simply because Rule 25a, a rule of procedure, says so. The Rule cannot require these results on the facts of this case; if it does, it is patently unconstitutional.

E. The Denial of These Motions Cannot Be Justified as an Exercise of Discretion.

As was pointed out in appellant's opening brief (page 10) the only reference to these motions in the District Judge's memorandum opinion of March 12, 1962 was:

> " . . . Motion [sic] of plaintiff to substitute personal representatives of deceased defendants Allen L. Chickering, Charles R. Blyth, and Harry H. Fair are denied, no purposes would be served in granting the same in view of the foregoing. It is further noted that as to the Allen L. Chickering and Charles R. Blyth motions over two years have elapsed since their deaths (Rule 25(a)(1) F.R.C.P.)" (R. 475)

Appellees say that the District Judge denied these motions as a proper exercise of discretion, on the ground of hardship in the administration of the various estates. But this argument is totally without support. There is not the slightest suggestion that he considered the alleged hardship to the estates. The memorandum

opinion makes it clear that he found it advisable to deny *these* motions because he considered (1) that the complaint failed to state a claim and (2) that indispensable parties had not been joined. There is no reference to any "hardship" and there is no reference to any exercise of discretion. In fact, his *only* reference to Rule 25a is, as can be seen above, merely one of "noting" that as to Chickering and Blyth the two-year period had expired.

Furthermore, appellant is at a loss to explain how appellees can logically suggest that a court could *in its discretion* deny these motions to dismiss because the frauds and the conspiracy occurred some time in the past.* Under the allegations of this complaint it was these very parties who contributed to that delay. If this is the rule, then we must recognize that the courts are offering a jackpot of complete immunity to those who can most skillfully conceal their wrongdoing.

It is ironic that this argument based on "discretion" is made most vehemently by the executor for Mr. Chickering—the very defendant who was responsible for emasculating the final minutes of the Funded Debt Protective Committee (Exhibit B, R. 206-208) and who concealed in his possession (or that of his attorneys) the Draft Minutes (Exhibit A, R. 202-206) until 1957 (Para. XXIX-A, R. 103-104). It is the executor of the same Mr. Chickering who devotes his brief (Chickering Brief, pages 60-74) to an argument that the estate is being inconvenienced by the existence of this claim against it. Appellees' anguished cries of "delay" can evoke little sympathy because the delay was no one's fault but their own.

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*Their attempts to illustrate potential difficulty in appellant proving its case are completely irrelevant. It may be noted that while appellees point out that several of the conspirators have died, they do not discuss the several years of costly discovery in which both sides have participated including depositions, interrogatories, etc., all of which properly perpetuate testimony.

CONCLUSION

It is respectfully suggested that the dismissal of appellant's complaint and the denial of the motions to substitute was error and an abuse of discretion and that the judgment of the District Court should be reversed and the matter remanded for trial.

C. Ray Robinson
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Duane W. Dresser
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Attorneys for Appellant
Miller & Lux Incorporated

Merced, California
March 12, 1963

CERTIFICATE PRESCRIBED BY RULE 18(2)(G) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Mary C. Fisher

No. 17933

United States Court of Appeals
For the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant,*

vs.

E. L. FRANCE, TRUSTEE, *et al., Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION No. 1183

BRIEF OF APPELLEES, HULDA S. CARLSON, *et al.*

WILLIAM E. EVENSON

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United States Court of Appeals
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION No. 1183

BRIEF OF APPELLEES, HULDA S. CARLSON, *et al.*

NATURE OF CASE

This action is brought by an incorporated Indian Tribe (Tr. 6) constituted under an Act of Congress with power to sue and be sued. Ex. 1, Art. 5(i). The action is not brought by Indians as such nor by any aboriginal group nor by incompetents. The corporation instituted and maintains this action in its own name for its own account.

We do not know who is prosecuting this appeal since the Notice of Appeal (Tr. 119) is stated to be on behalf of "Skokomish Tribe of Indians." Compare Exhibits 1 and 62.

This action was brought to quiet title (Tr. 23) to a narrow strip of "tidal land" (Fdg. 21; Tr. 93) which is alternately submerged and exposed with each turn of the tide twice a day and has been from time immemorial.

The strip is of no value except to the abutting upland owners as a means of access to navigable water.

The upland ownership by appellees is not in question. The tidal strip is bordered on the land side by the private property of appellees and on the water side by public navigable water. If the strip were not owned by appellees it would be only a basis for extortion against appellee upland owners. Appellant owns none of the abutting uplands and would have no access to the strip except via the water, and then only if the tide was out. Fdgs. 9, 10, 11; Tr. 91.

The theory of appellant's action was that the legal description of the land formerly comprising the Indian reservation as set forth in the Executive Order creating the reservation (Ex. 4) expressly included the tidal strip and hence the title to the strip should be quieted in the incorporated plaintiff as some form of successor to the original tribes which were settled upon the reservation pursuant to the Executive Order. Neither the Treaty (Ex. 3) nor the Executive Order included the tidal strip in the reservation. Fdgs. 4, 7, 23, 24; Tr. 89. The exact exterior boundaries of the reservation were surveyed and documented in 1862. Ex. A-14-1, attachment "B." The abutting uplands have long since been regularly disposed of by Indian allottees and there is no Indian or reservation land along any of the water-front. Fdgs. 9, 10, 11; Tr. 91.

This action does not and never has involved "fishing rights." The Treaty relied upon by appellant in Article 4 thereof says:

> "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States . . . ."

No one has challenged any rights of Indians to exercise any privileges granted by Article 4 of the Treaty. No issue in this case involves that consideration. This is solely an action to try title to a submerged tidal strip.

Appellant being unable to establish the tidal strip to be within the limits of the described and established reservation area sought to have the trial court speculate and infer that perhaps the tidal strip had contained sufficient edible shell fish in 1855 or 1874 to have constituted a necessary part of the subsistence and economy of the aboriginal Indians and hence should have been indispensably an appurtenance of the reservation. An issue of fact on this proposition was made at the beginning of this action and maintained throughout. See particularly the Pretrial Order No. 16008 — Tr. 85, 86, 97, 99. The issue was not only whether this tidal strip could or ever did contain usable quantities of shell fish, but also whether these or any Indians ever were dependent upon or derived material subsistence therefrom. The trial court after hearing a wide range of testimony and evidence, including all the hearsay that appellant could muster, expressly found against such contention of appellant. Fdgs. 14-20; Tr. 92-93. In Finding 16, Tr. 92, line 23, please correct the exhibit number to 62, rather than A-62. This tidal strip has never been and is not now a source of shell fish in usable quantities. Fdgs. 20, 21; Tr. 93; Fdg. 31; Tr. 95. The nature of this particular locale of low salinity (Fdg. 22; Tr. 92) explains why shell fish and marine life of interest to Indians were found several miles distant from this tidal strip. Fdg. 19; Tr. 93; Ex. A-62. Thus this issue could not blithely be disposed of by conjuring

up "judicial knowledge" that Indians were known to eat fish.

The appellees on whose behalf this brief is submitted are concerned only with the tidal strip along the northerly 5/8ths of a mile, approximately, of the former reservation in Section 26. In Section 26 the tidal strip is specially narrow, rocky and gravelly. Fdgs. 20, 21; Tr. 93; Ex. A-3-7.

The main highway, U.S. 101, skirts the Hood Canal area and traverses the Indian Reservation. Ex. A-48, A-62. All the land in Section 26 between the highway and the waters of Hood Canal have long also been legally allotted to Indians and legally conveyed by them with government approval to and vested in appellees and their predecessors in title. Fdgs. 9, 10, 11; Tr. 91.

Section 26 also has a separate interesting and pertinent history showing its inclusion in the reservation only by separate and later proceedings. It was purchased by the government from a homesteader Fisher pursuant to a special Congressional appropriation for addition to the reservation, and was not carved out of the public domain, as was the balance of the reservation. Fdg. 5; Tr. 90; Fdg. 23; Tr. 93-4; Ex. A-14-1, A-14-2, A-14-3 and A-14-4. The significance of this difference will be commented upon later.

ARGUMENT IN ANSWER TO APPELLANT

AMBIGUITY RULES NOT INVOLVED

Appellant's argument about an ambiguity in either treaty or executive order was never made in the trial court at any time during the many years this action has been pending. See particularly the Pretrial Order. No. 16008 — Tr. 80, and Plaintiff's Contentions, p. 82, Issues of Fact Claimed by Plaintiff, p. 96, and Issues of Law Claimed by Plaintiff, p. 99.

The suggestion that either the treaty or the executive order were ambiguous is made for the first time in appellant's brief and in this court.

The trial court found these documents and all historical background material clear, unambiguous and factual, and expressly not including or manifesting any intent to include this tidal strip within the legally defined reservation. Fdgs. 3, 4, 5, 6, 7, 23, 24; Tr. 89-98.

The whole object of the treaty negotiation and ultimate establishment of the reservation was to provide a basis for opening up and settling the region and for surveying and laying out the region for disposition to settlers and by exact land descriptions, with the natives resettled upon exactly defined reservations, to be set aside for their exclusive occupancy. The interval of time between the treaty of 1855 and the executive order of 1874 is the period during which such government land surveys were carried out. No townships, no sections, no legal descriptions for the reservations or for patents to settlers could be expressed until such surveys were complete. Ex. A-14-1, attachment "D" at

p. 2. The exterior boundaries of the reservation were surveyed and legally described in field notes. Ex. A-14-1, attachment "B."

Appellant recites concern over a river margin of the reservation, but that margin of the reservation is not involved in this lawsuit and hence we refrain from a discussion of the river matter.

A width of 200 feet stated by appellant for the narrow, rocky tidal strip in Section 26 is obviously inadvertent. Fdg. 21; Tr. 93; Ex. A-3-7.

RULE OF CONSTRUCTION FOR TREATY OR EXECUTIVE ORDER

Assuming that the treaty and/or the executive order are subject to interpretation, how should the pertinent language thereof be construed? The pertinent language of the treaty is:

> "There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, *to be hereafter set apart, . . .*"

The pertinent portion of the executive order is as follows:

> " . . . thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning."

The general rule is that in grants or conveyances where a call of a legal description is to the shore of the sea or bay or other body of navigable water, or where the shore or shoreline of such body of water is designated as a boundary, that the high water mark is the

limit of such call or boundary line. This rule was established by the United States Supreme Court in the early case of *United States v. Pacheco,* 2 Wallace, 69 U.S. 587, 590, 17 L.Ed. 865. At page 590 the court says:

> "The position, that by the bay as a boundary, is meant, in this case, the line of low water mark, is equally unfounded. By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails."

In this case one of the boundaries was designed as "the Bay of San Francicso."

Disposal of public lands during the territorial period are not lightly to be inferred. Lands under navigable waters are to be deemed held for the future state. See decision involving The Red Lake Reservation in Minnesota.

> *U.S. v. Holt State Bank* (1926) 270 U.S. 49, 70 L.Ed. 465.

The above rule is again referred to in *Shively v. Bowlby,* 152 U.S. 1, 38 L.Ed. 331, at page 29.

But appellant contends that the ordinary rules of construction should not apply, and that the treaty and executive order should be interpreted as the Indians understood them, and that the Indians understood they were to include the tidelands bordering on the reservation. We think this position, on both counts, is untenable.

Appellant quotes from *Worcester v. State of Georgia*

and cites other cases with similar language. This language, frequently quoted in behalf of the Indians, is to the general effect that since they were an unlettered people and were not in a particularly good bargaining position, that any uncertainties or ambiguities in treaties should be construed in their favor.

We submit that the application of this language has been clarified by later Supreme Court decisions involving interpretation of Indian Treaties. These cases are:

Choctaw Nation v. U.S., 318 U.S. 423, 87 L.Ed. 877 (1943);

Northwestern Shoshone v. U.S.; 324 U.S. 335, 89 L.Ed. 985 (1945);

Ute Indians v. U.S., 330 U.S. 169, 91 L.Ed. 823 (1947).

In the *Choctaw* case, *supra,* the dispute actually was between the Choctaw Indians and the Chickasaw Indians, and the question was whether the Chickasaw were entitled to compensation from the Choctaws for lands allotted from a common reservation to the Choctaw's slaves. Determination of this question depended upon the interpretation of a treaty between the two Indian tribes and the United States. The court says, beginning at page 431 of the U.S. Report:

> "Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. (Citing cases) Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a

spirit which generously recognized the full obligation of this nation to protect the interests of a dependent people.' (Citing cases)

"*But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.* (Citing cases) Here the words of the proviso are inapposite to the proposed construction and we do not believe the findings are enough to warrant departing from the language used. The findings are merely findings as to evidence. There is no finding as to the ultimate fact whether or not the two tribes intended to agree on something different from that appearing on the face of the 1902 agreement. Without such a finding the agreement must be interpreted according to its unambiguous language."

In the *Shoshone* case, *supra,* usual argument was made that any inference from the treaty language, should be construed to favor the Indians. The court said at page 353:

"Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian of the Indians, to our ward's prejudice. 'All doubts,' say petitioners, 'must be resolved in their (the Indians') favor.' Mr. Justice McLean, concurring in *Worcester v. Georgia,* 6 Pet. (U.S.) 515 at 582, 8 L.Ed. 483, 508, said 'The language used in treaties with the Indians should never be construed to their prejudice.' But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties

meant by the treaty. *We stop short of varying its terms to meet alleged injustices.* Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

In the *Ute Indian* case, *supra,* because of an error in a boundary survey of an existing reservation, the president by executive order added some additional land to the reservation. Subsequently the reservation was ceded back to the United States by the Indians, and the Congress agreed to pay the Indians for the land ceded back. The question was whether the Indians were entitled to compensation for the land described in the executive order. In response to the argument that the Indians thought they owned the executive order lands at the time they ceded the reservation back to the United States, and hence should be compensated for the same, the court says, beginning at page 179:

"It is said, however, that the Indians understood in 1880 that they owned the Executive Order lands which lay north of the White River Valley; that they understood their 'present Ute Reservation' to include them; that they understood that Congress undertook by the 1880 Act to sell the lands for their benefit; and that Congress was aware of this understanding. The majority opinion of the Court of Claims stated that 'in all probability' this was true. The writer of the concurring opinion thought differently. But even if the Indians had believed that they had a compensable interest in the Executive Order lands, this fact would not necessarily have given it to them. Certainly the absence of presidential authority to give them a compensable title could not be supplied by the Indians' understanding that the President had such authority.

The Sioux Indians may also have thought the President had authority to convey title to them; but the reasons on which our decision in the *Sioux* case (U.S.), *supra,* rested do not indicate that our holding depended in any way upon the understanding of the Indians. Nor can this alleged understanding be imputed to Congress in the face of plain language and a rather full legislative history indicating that the 1880 Act neither conveyed nor ratified conveyance of these lands. While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create Presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. *Choctaw Nation v. United States,* 318 U.S. 423, 431, 432, 87 L.ed. 877, 882, 883, 63 S.Ct. 672. *We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so."*

ENLARGEMENT OF RESERVATION FOR SHELL FISHING

Appellant would have this court enlarge the reservation defined in the executive order to include the tidal strip as a place on which it might shell-fish, premised on the theory that the Indians anciently did occupy and use this particular tidal strip for actual shell fishing; that shell fish in usable quantities actually could be found in this particular strip; that the subsistence of the Indian tribe was dependent upon the shell fish of this beach to a material extent; that it should have been

the intention of the United States to encompass the tidal strip in the reservation, and accordingly that the treaty and the executive order, together, should be construed to include the tidal strip as a part of the original reservation, but not as a part of that which has been allotted and disposed of by the Indians with government approval. These contentions are disputed by appellees.

The Skokomish Indians and associated Indians were river people whose subsistence was primarily geared to easily procured salmon and who never had more than a casual interest in the beach along the tidelands in question. Fdgs. 14 through 22. They lived primarily in villages up salmon rivers (Tr. 331), although by their canoes they could travel the river, Hood Canal and other parts of Puget Sound. Tr. 414, 344, 328, 190. This particular tidal strip never was a habitat for a usable amount of shell fish life of native varieties prior to the introduction of other varieties by white men. Tr. 691, 743, 705, 733, 756, 697. Far better locations for shell fish were accessible at other places on Hood Canal, such as Hoodsport (Tr. 744, 752, 688, 756), Brinnon (Tr. 352), Patricia Beach (Tr. 332-3), Belfair (Tr. 240, 349-351, 405, 496), Red Bluff (Tr. 742). On the map, Exhibit A-62, other leading sites are marked in red and at a substantial distance from the litigated strip. Shell fish were only an occasional delicacy. Tr. 334. These tidelands not only were not a source of shell fish life, but the economy and subsistence of these particular Indians and their predecessors was not and could not have been dependent upon the shell fish of this strip. There never was in any of the correspondence or literature of the

times anything to suggest that these particular tidelands were a material, let alone an essential part of the basis for subsistence of these Indians.

FISH-EATING NOT SAME AS SHELL FISHING

There is no question that native Indians eat fish. Primarily this was salmon. In the case of these Indians it was almost entirely salmon. Fdg. 14. Other sea life or shell fish when desired were procured where it was natural and easy to do so. See red circles on Exhibit A-62. Shell fish were not obtained from this particular beach to any material extent, if at all.

The only significance of fish-eating habits of the early Indians is in reference to appellant's claim that subsistence and survival imperatively required the boundaries of the reservation to be enlarged as a matter of law and interpreted to encompass a particular strip of beach.

Appellees say the facts do not support the premise that this beach was an essential source of subsistence, nor does the law permit re-writing the executive order now.

Appellees have contended from the beginning that this particular beach was never a reasonable source of shell fish, nor was it ever so used or depended upon by any Indians, and that there could be no basis for judicial notice to the contrary.

The Indians were fish-eaters, but not particularly shell fish-eaters, and certainly not from this beach.

Appellees disagree with appellant's contention that plaintiff has proved that anciently this beach was used

as a principal source of livelihood for the Indians. So did the trial court. Fdgs. 14 through 22.

ENVIRONMENTAL FRAMEWORK

The minutes of the council meeting between Governor Stevens and the Indians (Ex. 10) contain specific reference to salmon and river fishing, and no reference whatever to shell fishing.

The treaty does not deal with tidelands or beaches.

The quotation from the treaty with reference to taking fish at usual and accustomed grounds and stations is not an issue. No one disputes the right of the Indians to fish at accustomed places to the extent permitted by the treaty. Nothing in the pleadings or pretrial order involves an issue as to fishing rights. Such is not a land title matter. This lawsuit concerns land title not fishing.

INDIAN USE AND OCCUPANCY

The Skokomish Indians were river people. According to the sources of their language Skokomish means river people. Tr. 370. They primarily were concerned with living on rivers and creeks where salmon would run. Tr. 331, 267, 354, 357, 358, 362. The salmon were a very abundant food source and readily obtainable from the rivers and creeks. Tr. 326, 334-5. The precarious, uncertain and difficult task of digging in gravel and rock or even in mud for shell fish would have been very unattractive by comparison with the ease of procuring salmon. Tr. 499, 705.

Professor Elmendorf in his book (Ex. 60) at pages 255 and 257 and 258, definitely ties these Indians to the

salmon fishing creeks and streams. This same fact is manifest in the Myron Eells publication at page 605. Ex. 57.

Professor Elmendorf evidently testified directly in the Indian Claims Commission case because in Exhibit 62, the findings at page 6-143 and at page 6-144 cite Elmendorf for the proposition that there were nine basic villages, all of which were at the mouths of rivers entering Hood Canal. It should be particularly noted that the Skokomish were fixed by him as being primarily located at the forks of the Skokomish River and other bands at Vance Creek westerly of the fork. The court will note on the large map, Exhibit A-62 (the only exhibit showing all of Hood Canal and the reservation area), that the fork of the Skokomish River is westerly of the present reservation and that Vance Creek is westerly of that. Both locations are a considerable distance from the mouth of the river and far from most of the beach property in litigation. Professor Elmendorf's book (Ex. 60) at page 38 in referring to Potlatch, Site No. 39, noted that the site had no creek (Tr. 218) and on that account would never have been used for more than temporary camps in aboriginal times. Note: no exception has been taken to Finding 17.

The topographic map of 1884 (Ex. 36) shows reservation buildings to be on the river, which is to be expected. In the region of Potlatch the only notation is cobblestones and gravel.

Exhibit 5 being field notes concerning the exterior boundaries of the reservation details the running of actual lines throughout many courses of the reservation area for the purpose of locating the township lines, sec-

tion corners, quarter corners and sixteenth corners and recites in Exhibits 5-o and 5-q encountering Indian houses. These, it will be observed, were encountered in Section 12 and hence on the river. The exterior boundaris of the reservation are also described in Ex. A-14-1 attachment "B."

Exhibit 41 is the township map for Township 21 North, Range 4 West, and on it will be observed the top tier of lots remain unsurveyed, but all the river bottom land was surveyed.

The reservation area finally selected was no wilderness casually assigned to Indian use. This was a rich location with timber on the higher ground, the largest river entering Hood Canal, with a virtually inexhaustible supply of salmon and other fish, and the largest amount of river bottom farming land in the region. It is noted at the conclusion of the surveyor's notes, defendants' Exhibit A-14-1, attachment B, page 7:

> "This reservation is very well selected for farming purposes."

We suggest there was no reliable evidence of any actual use and occupancy of the tidal strip by the Indians or their predecessors.

Manifestly, it was impossible actually to occupy an area over which the tide ebbs and flows, and this would have been particularly true of primitive people without means of building stone or concrete bulkheads, revetments, dikes or other structures into tide water. Obviously the only occupancy or use which the Indians could ever have asserted to the tideland strip would have been the possibility that they from time to time went upon it as a clear trail at low tide to avoid the

brushy upland. It is defendants' position that the strained efforts of plaintiff's witnesses to account for the possibility that their ancestors may have gone upon this tideland strip from time to time for shell fishing or other uses is insufficient to sustain any finding of material use or occupancy. The hearsay testimony offered over objection (Tr. 178, 374) justifiably could be considered most unreliable, and manifesting no more than common knowledge that anciently the Indians from time to time, where they could have done so without undue effort, would have procured shell fish. This area we will show under a separate heading was not such a place to which it is likely the Indians could have or would have resorted for shell fish.

Witness after witness conceded that the Indians ranged up and down Hood Canal (Tr. 190, 248, 250, 327-9, 344-5, 414, 427) when they were not fishing in the rivers, and that there were numerous places both toward the head of Hood Canal at Belfair (Tr. 240, 349-51, 405, 332-3) and toward the mouth in the direction of Quilcene (Tr. 352, 744, 752, 756, 688-9) where there were good shell fishing areas. The complaint refers to this tidal strip as being an excellent and profitable source of shell fish having a high commercial value. No evidence was ever submitted to sustain such an allegation. Finding 31, Tr. 95. There is hardly evedence in the case of enough clam digging possibilities in this area for so-called sports fishing, let alone for either a commercial operation or to provide any significant basis of livelihood for any single family or group of families.

SHELL FISH NEVER EXISTED IN USABLE QUANTITIES ON TIDELANDS IN ISSUE

The tidelands bordering Annas Bay being the bulge at the elbow in Hood Canal are not and never were a source of shell fish of a type or quantity that would have been resorted to in aboriginal or modern times to provide a livelihood, and never were so considered.

The studies of Dr. Jerome Stein reflected in his testimony (Tr. 577-669) and in the Exhibits A-49 to A-58, inclusive, fairly establish that the area is not one productive of sufficient shell fish life to warrant any conclusion that primitive tribes could in any degree have been dependent upon this stretch of tidelands. He showed that the tidelands abutting the reservation on the west side of Hood Canal are rocky and gravelly and rather narrow, and that a muddy or siltier type of tideland existed at the south margin of Annas Bay adjoining the mouth of the Skokomish River because of the estuary-like characteristics of the mouth of that river silting up the general region. His testimony explains how the Indians could mistake some of the clams they might presently find in this area for those which were originally to be found in Puget Sound waters. The bulk of the clams he could account for are of varieties that did not exist prior to the coming of the white man. He has shown the court that this region was not a natural habitat for shell fish. His curiosity extended beyond such physical findings from extensive digging throughout the beach area to an investigation of what characteristics the water had in the region which might account for the lesser amount of shell fish life in this area than might be found at Hoodsport and to the north where

his laboratory was located. The most obvious characteristic is the large flood of fresh water into Annas Bay. The Skokomish River is the largest fresh water inlet into Hood Canal and is a very large river drawing on a large drainage basin from two major forks of the river. All of this fresh water anciently and still does enter Annas Bay. Today, from time to time a portion of the river water enters Annas Bay at the Tacoma Powerhouse, rather than the river mouth, but still basically into the same bay. Dr. Stein tested the salinity of the water and tested the effect of salinity on the shell fish life in the region, from which it was quite manifest that this entire bay area has a salinity much below that of other parts of Hood Canal and that this salinity factor has a direct relationship to the ability of shell fish to survive.

There is reason to suppose that the testimony of appellant's witnesses that shell fish are procurable from this beach today may have been exaggerated when consideration is given to the testimony of Wallace Hanson and his wife, Alice Marie Hanson. When they burned out in 1946, and were for a year and a half obliged to live off the beach in any way they could, they got a major portion of their subsistence from shell fish that they had procured north of Hoodsport, being far north of the strip in litigation. Tr. 697. They did not obtain the same from any of the beach area in question. Tr. 692, 696-7. This is particularly significant proof of the limited "shell fish value" of this beach since the Hanson family owned Minerva Park, Enati Beach and additional beach extending toward Nalley's and thus the largest amount of this waterfront in any single

ownership. Tr. 686. The simple fact is that in desperation for life the Hansons did not even turn to their own beach property at the Skokomish reservation, but went to other places on Hood Canal. We are confident the aboriginal Indians must have done likewise.

Witness after witness acknowledged the desirability of seeking shell fish up toward Belfair and down the canal in the other direction and across on the opposite side from the Skokomish River. Evidently to take advantage of the more desirable shell fishing in these other areas, whole families would embark in large canoes sufficient to carry numerous people and they would be gone for a considerable period of time while they availed themselves of the resources of these other regions. Note places circled in red on the map of Hood Canal, Exhibit A-62.

It is noteworthy that Professor Elmendorf in his citation of places (Ex. 60) at which the Indians resided or established themselves at any time for any purpose indicates Site No. 117 at *Patricia Beach* as the closest one identified as a site for clam digging. This Site No. 117 is described on page 47 of his publication, and its relative location is to be seen on the map opposite page 48 of his book, and shows the same to be a considerable distance toward Belfair from the Town of Union. The attention of the court is invited to the four-township map, Exhibit A-48, and the total Hood Canal map, A-62, on which the present-day Patricia Beach tracts appear and undoubtedly identify the region referred to by Professor Elmendorf at Patricia Beach. It can thus be seen that the first clam digging site worthy of comment as such by Professor Elmendorf was many miles

eastward from the Skokomish River and the Skokomish Reservation.

JUDICIAL NOTICE OF SHELL FISH SOURCES

The rule of judicial notice urged by appellant is applicable principally in a situation where no issue is framed, no other proof is available or evidence is in the record and there are no findings of fact.

Here, as noted in our discussion under Nature of the Case these matters were in issue, they were contested, proof was offered, the integrity of witnesses was before the trial court, express findings were made from evidence and without speculation, inference or judicial supposition.

Certainly these Indians ate fish, particularly salmon. It is not true that they depended upon shell fish or that this tidal strip was the source of the shell fish they did use. They had better and easier sources.

SUBSISTENCE OF TRIBE NOT DEPENDENT UPON SHELL FISH OR THE BEACH

The contention of appellant that the tidelands impliedy must be regarded as having been a part of the area assigned for reservation purposes because the subsistence of the tribe was dependent upon the use of the beach and particularly for shell fish is not borne out by the facts.

The treaty itself and the available evidence of matters leading up to the treaty contain virtually nothing to justify the thought that shell fishing, particularly at this location, was significant.

The treaty (Ex. 3) in Article IV, contains the only

reference to shell fish and that as a specification that the Indians "shall not take shell fish from any bed, staked or cultivated by citizens." The same treaty, Article IV, in the only reference to fishing states "the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens. . . ." The fact is that this particular reservation location is not identifiable from the treaty nor was it intended to be since the reservation was to be something "hereafter" set apart, nor was access to shell fish a matter which drew particular comment.

The minutes of the meeting of Governor Stevens with the Indians at Point-No-Point on January 26, 1955 (Ex. 10) reflect no reference to shell fish. On page 2 of the typewritten transcript in evidence, the first Indian to speak was a Skokomish who said: "I wish to speak my mind as to selling the land, great Chief! What shall we eat if we do? *Our only food is berries, deer and salmon.* Where then shall we find these? I don't want to sign away all my land, take half of it and let us keep the rest." Fdg. 14.

The second of the Indians to speak said he did not want ". . . to leave the mouth of the river."

The agent explained that if they kept half their country, they would have to live on it and would not be allowed to go anywhere else they pleased. That if a small tract was reserved for the reservation they would have the privilege of going wherever else they pleased to fish.

Following this explanation, the Duke of York said: "My heart is good. I am happy since I have heard the

paper read and since I have understood Gov. Stevens, particularly since I have been told that I could look for food where I pleased and not in one place only." Again he says: "We are willing to go up the Canal since we know we can fish elsewhere. We shall only leave there to get *salmon* and when done fishing will return to our houses."

Such migrations of the aboriginal Indians of this area as occurred followed the variations in the salmon runs. Exhibit 62 at pages 6-157 and 6-146.

Throughout the testimony of Professor Elmendorf (Ex. 60) there are repeated references to the significance of salmon and the salmon fishing sites as the actual historic basis for the subsistence of these particular bands of Indians and in this region. On page 34 of his book, Site No. 18 is described as the principal Skokomish settlement in prewhite times. He notes that there was a fish weir at that point, and this was the third in the river, counting from the mouth. The first 31 sites he identifies on pages 32 to 37 in his book are located on the Skokomish River. These are clearly the principal headquarters of these people, and the prime reason manifestly was easy salmon fishing in a comparatively sheltered area. The only site Professor Elmendorf identifies between the mouth of the Skokomish River and Potlatch are Sites No. 32 to 39 on pages 37 and 38 of his book. None of these are identified as a location for shell fishing, and none are identified as a basis for any form of fishing, although at Site 37 reference is made to herring spawning in a little cove.

As already noted the closest site identified for clam digging is Site 117 many miles eastward.

The attempt by hearsay evidence to establish this tidal strip as essential to subsistence of the aboriginal tribes and hence presumptively intended to have been a part of the reservation cannot be sustained by the evidence.

Likewise, if for any reason the tidelands should impliedly be deemed a part of the reservation, there was no reason from the standpoint of tribal subsistence to treat the tidal strip as withheld from the allotments heretofore made and sold, particularly when no access was preserved to such tidelands except from the water side.

All these matters were put at rest by the findings of the trial court. Fdgs. 14-22, 31; Tr. 92-95. These represent the court's evaluation of the witnesses, testimony and evidence. We suggest these findings are beyond challenge.

SUBMERGED RESERVATION AREAS

Appellants cite three situations where courts have been concerned with submerged areas in reservations.

Appellant cites *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, in which the reservation for the Indians there involved was referred to as "body of lands known as the Annette Islands, situate in Alexander Archipelago in Southeastern Alaska." This was held to include the whole group of islands with intervening waters and submerged lands between.

Appellant cites *Donnelly v. United States,* 228 U.S. 243, a murder case where jurisdiction depended upon title to the bed of the Klamath River where the deceased was shot. It was held on page 264 if the river

was a non-navigable stream, title would be in the United States, and if the river was in fact navigable, the California Legislature had by two specific acts vested title to the bed of the river in the United States as a riparian owner, hence the place of the offense was on United States property under either theory.

Appellant cites *Moore v. United States,* 157 F.2d 760. The Skokomish treaty in Article II states: "There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, *viz.*: The amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal . . ." It is of interest that the Skokomish treaty with this specific provision for six sections of land is unlike so many treaties, such as the Quillayute treaty with which the *Moore* case is concerned, where similar wording also specified a tract of land "sufficient for their wants." This latter specification concerning the future wants of the Indians, not in the Skokomish treaty, would impose an extra obligation upon the United States and does suggest why a court would expect to interpret a later executive order as designed to discharge that obligation. Actually the Skokomish Indians and their predecessors were not dependent upon the tidelands in question, nor even on shell fish if such had been reasonably procurable from these tidelands. The Quillayute case shows proof of many facts concerning actual Indian industry and commerce upon and use of the river area by the Indians by the time of the executive order. The State Fisheries Department was enjoined from its attempt to regulate the Indians out of their use of the river for fisheries.

FISHER DONATION CLAIM STANDS ON DIFFERENT FOOTING

Appellees submitting this brief are claimants to property in Section 26 which was not a part of the original reservation, but was in the Fisher Donation Claim and added to the reservation by purchase from Fisher. On that account their position involves an element additional to that of claimants to tidelands not in the former Fisher Donation Claim.

The original reservation evidently was in operation a considerable time before the formal surveys could be made or an executive order issued. The original reservation did not reach as far north as Section 26, and in fact, did not even reach to the north margin of Section 35. Exhibit 6 undertakes to show the subdivisional lines and meanders of the Skokomish Indian Reservation, December 2, 1873, and plainly shows the north boundary of the reservation within Section 35 and short of Section 26.

Exhibit 7 is a diagram of April 24, 1874, for the purpose of showing the *additions* to the Skokomish Indian Reservation per the executive order dated February 25, 1874. The heavy line on the exhibit marks the original reserve. This is also reflected in Exhibit A-10, being a survey of Township 22 North, Range 4 West, of July 26, 1873, and is clearer than Exhibit 38 which bears some alterations.

Exhibit A-14-1 carries an attachment B, being the surveyor's notes concerning the *exterior* boundaries of the Skokomish Indian Reservation, on page 6 of the typewritten transcript of which it is noted he set a post on the south boundary of the Fisher Donation Claim

This exhibit A-14-1 on the second page records the recommendation of the addition of the Fisher Donation Claim as represented by the blue lines on one of the attachments, and on page 3 proposes that this be purchased from Fisher. The sketch with the colored lines clearly showing the original reservation and the proposed addition of the Fisher Donation Claim is the document identified as attachment C annexed to Exhibit A-14-1.

The story concerning the proposed addition continues in attachment B to the same exhibit, and from Ex. A-14-4, we gather that in 1862 the Indians entered upon the Fisher property although it had not yet been acquired. That in 1869 Fisher was told by the government that it had been decided not to acquire his property. Then in 1870 the improvements on the Fisher property were destroyed by the Indians, after which in 1874, a recommendation for the enlargement of the reservation by adding Fisher's property to it was renewed.

FISHER DONATION CLAIM DIFFERENT FROM ORIGINAL RESERVATION

Fisher settled upon the area constituting the Fisher Donation Claim, which now constitutes all the Section 26 frontage of the former reservation, under the Oregon Donation Land Act of September 27, 1850. 9 Stat. 496. Exhibit 1-14-4, page 4. Both Exhibit A-14-4, page 4, and attachment D to Exhibit A-14-1 show that Fisher had proved up and perfected his rights and was entitled to a patent to the property long before the recommendation for adding his property to the reservation came up.

The only reason that the patent could not actually issue to Fisher was that the survey of 1873 had not yet been made, and until made in Section 26 (Ex. A-9, A-10 and 38) a description could not be inserted in a patent form. Nevertheless, the law accords to Fisher the equivalent of title from the time he proved up and became entitled to one. *Cosmos Exploration Co. v. Gray Eagle Co.* (1903) 190 U.S. 301, 47 L.Ed. 1064.

Exhibit A-14-2 further shows the validity of the claim of Fisher to his property and the proposal to purchase his property for addition to the reservation.

Exhibit A-14-3 is the draft of the proposed bill providing for the acquisition by purchase from Fisher of his property. This later was enacted. See 23 Stat. 246. All of defendants' Exhibits A-14-1 through A-14-4 bear out the desire to add the Fisher property to the present reservation which had been set up pursuant to the treaty and to acquire the Fisher property by purchase as a desirable addition.

DID FISHER DONATION CLAIM INCLUDE TIDELANDS?

The easterly boundary of the Fisher Donation Claim under all applicable rules of law should have stopped at the line of ordinary high water or the meander line whichever was most seaward. A patentee and grantee from the United States could not get title beyond the line of ordinary high water, and that land which was below navigable water and below the line of ordinary high water would have been reserved for the State to be formed.

The emphasis throughout all the material discussed

above with reference to the Fisher Donation Claim shows the anxiety to acquire and attach to the reservation this upland property to which Fisher was entitled to a patent under the Donation Land Law. Not one word enters into any of this documentation to suggest that there would be added on the north and encompassed with the Fisher Donation Claim a narrow gravelly tideland strip between the high and low water mark as the tide would daily recede. Not one word appears in the documentation to suggest there existed a shell fish subsistence area abutting the Fisher Donation Claim that would also be a desirable addition to the reservation.

The only thing in Section 26 that was added to the reservation was the upland Fisher Donation Claim. Tidelands in Section 26 were never intended to be and never were added to the reservation.

The government deraigns its title to so much of the reservation as it existed in Section 26 by purchase and acquisition from Fisher. Thus, plainly, in allowing Fisher to settle upon and prove up on Section 26 as it fronted Hood Canal, the government was anticipating that the abutting tidelands would eventually be subject to disposition solely at the instance of such State as would be formed out of the territory.

SURVEYS NOT IRRELEVANT

The surveys actually made and legal descriptions filed of actual *exterior* boundaries of the reservation (Ex. A-14-1, attachment "B"; and Ex. 5 f and 5 b) show an interpretation of the reservation boundaries by the persons closest to the actual situation who were

on the ground and whose actions best reflect the intention of those concerned at the time, with locating and defining the actual reservation. This is the most reliable evidence in the record of contemporaneous administrative interpretation, rather than the hearsay testimony cited by appellant.

We do not have here a problem of erroneous or conflicting surveys such as were the subject matter of the cases cited by appellant.

APPELLANT A CORPORATION AND *SUI JURIS*

Appellant quotes from its charter (Ex. 1) the detailed provisions showing its chartered authority as approved by the Secretary of Interior pursuant to the 1934 Act of Congress, authorizing the incorporation. We agree appellant, under the charter adopted April 2, 1938 and approved May 3, 1938, is by Article I "a body politic and corporate of the United States of America, under the corporate name The Skokomish Indian Tribe," and in Article 5 (i) has had complete power and authority to sue and be sued since its incorporation. Appellant is a corporation with a federal charter and has been and is *sui juris*. As such appellant is not immune from all the usual rules of equity, estoppel, waiver, and statutes of limitation to which competent legal entities are subject.

In its corporate capacity appellant has been and is waging its claims against the United States before the Indian Claims Commission. Ex. 62. That is where appellant should seek the kind of relief or adjustment it erroneously pursues here.

Solicitude of the courts for Indians is expressed in

many opinions but there are also other cases recognizing such solicitude may not be turned from a shield to a weapon.

Felix v. Patrick, 36 Fed. 457, 461, 462 (CC Neb. 1888), 145 U.S. 317, 36 L.Ed. 719;

Pope v. Falk (Kan. 1903) 72 Pac. 246 (appeal dismissed 201 U.S. 651, 50 L.Ed. 906);

Dunbar v. Green (Kan. 1903) 72 Pac. 243, 245.

CONCLUSION

Appellees maintain the record shows:

1. Executive order and treaty do not describe or include tidelands.

2. Surveys and history show tidelands never included or intended for inclusion in reservation.

3. Executive orders for other reservations made at same time specifically included tidelands. Ex. A-1.

4. Tidelands are held for State to be formed out of territory. Exception for Indian lands actually set aside is inapplicable here.

5. Allotments exhausted access to tidelands and inferentially carried whatever rights in tidelands might have been attributable to uplands.

6. No title in tribe as such to warrant a quiet title action. Title in U.S.A. Plaintiff must prevail on strength of own title. *Perfect Circle Co. v. Hastings Mfg. Co.,* 88 F.(2d) 813.

7. No title could be in incorporated plaintiff to warrant a quiet title action. *Hynes v. Grimes Packing Co.* (1948) 337 U.S. 86, 107-110.

8. Reservations set aside by executive order do not involve a grant of title to any Indian or Indian tribe.

9. Aboriginal title not involved.

10. No federal question involved in quiet title action or boundary action. No treaty interpretation is involved.

11. Proper rule of construction of a treaty or executive order does not include rewriting either the treaty or the order to afford relief for alleged inadequate treaty or order.

12. Appellant's claim is against United States (as asserted in Indians Claims Commission proceeding, Exhibit 62). Claim should be addressed to Congress.

13. Executive order description and treaty not vulnerable to enlargement on theory of necessary shell fishing. Indians did not depend upon shell fish but found them only as an occasional delicacy; these tidelands not a natural habitat for shell fish; other areas were resorted to for shell fish; these tidelands were never intended for shell fishing or reservation purposes by these salmon-eating river people.

14. All the reservation abutting the tidelands was allotted and disposed of to appellees' predecessors. There would be no access to tidelands except by trespassing on appellees' uplands.

15. Treaty minutes, Elmendorf testimony and al records emphasize salmon economy and subsistence and minimize so-called shell fishing interests.

16. Fisher Donation Claim was purchased by United States from Fisher to add to then "present" reserva

tion as it had already been located, surveyed and occupied.

17. No proceedings incident to acquisition of Fisher property or drafting of description for executive order or officially defining reservation ever showed intent to include tidelands.

18. Appellees' use and occupancy goes back early in century to time of first State tideland deeds or earlier.

19. Appellees' use and occupancy has been continuous under claim of right and payment of taxes.

20. There has been no Indian use or occupancy nor need for any.

21. Appellees and their predecessors have bought in good faith for value from Indian allottees with full government approval.

22. Laches and limitation do apply to appellant and appellant is barred to recover the relief prayed for.

23. Appellees were entitled to the decree appealed from quieting their title.

Respectfully submitted,

WILLIAM E. EVENSON

SKEEL, MCKELVY, HENKE, EVENSON & UHLMANN

Attorneys for Appellees, Hulda S. Carlson, Myrtle L. Strine, Luella Greeley, Florence Macke, John W. Phillips and Jean S. Phillips.

1020 Norton Building
Seattle 4, Washington

February 11, 1963

NO. 17933

In the
United States Court of Appeals
For the Ninth Circuit

SKOKOMISH INDIAN TRIBE
Appellant,

vs.

E. L. FRANCE, Trustee, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION NO. 1183.

BRIEF OF APPELLEES, FRANCES NALLEY AND PUGET SOUND NATIONAL BANK, AS EXECUTOR OF WILL AND ESTATE OF MARCUS NALLEY, DECEASED

GORDON, GOODWIN, SAGER & THOMAS
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PRELIMINARY STATEMENT

In this brief, the appellees Nalley (Puget Sound National Bank, as executor of the estate of Marcus Nalley, having been substituted for the appellee, Marcus Nalley) do not purpose to respond to the general arguments of the appellant. Rather, to save repetition, we approve and adopt the general argument as contained in the briefs of the appellees, Hulda S. Carlson, et al.,

and the brief of the City of Tacoma. With one or tw minor exceptions, this brief will be restricted to the issu presented by the effect of the prior state court actio in Mason County.

NATURE OF CASE

In the opening paragraph of appellant's Statemen of the Case (aplt's Br. p. 3) it says that the issue in thi case involves title to the tidelands fronting upon th Skokomish Indian Reservation. With this statemen we agree. It is the only issue. Albeit, the appellant else where in its brief seems to assert that the Indians fishin rights are also involved.

The right of the Indians "to fish at their usual an accustomed stations", as guaranteed by the treaty (Ex 3) was never denied, questioned or put in issue at an time by any of the appellees, during the long tenur of this litigation. If it is established that any "usual an accustomed fishing station" exists upon any of th tidelands in question, these appellees will concede tha the Indians still have a right to go to such station t fish. However, the right to fish at a particular spot doe not give fee title to that spot. *Seifert Bros. Co. v U.S. 249 U.S. 194.*

ARGUMENT

In nineteen of the twenty one subdivision's of appel lant's argument it prefaces each such argument with statement "The trial court did not discuss (or commen upon) this problem". If appellant means that the cour did not discuss each of these arguments orally fron the bench, the statement is probably literally true. I

by this insidious repetition, appellant implies that the court gave no consideration to these matters, the comment is unjustified.

After the trial of this matter, in December, 1960, the court asked all of the parties to file briefs. Some months later, after the filing of briefs, oral argument was heard by the trial court. At the conclusion of the oral argument, the court requested each of the parties to file proposed Findings of Fact and Conclusions of Law. The appellant filed its proposed Findings and Conclusions on June 27, 1961 (Tr. 37-82). Roughly six months thereafter the trial court filed its Memorandum Opinion (Tr. 33) and at the same time entered an order directing a final draft of Findings, Conclusions and Decree (Tr. 87). It should be presumed that during this long period the trial court gave full and adequate consideration to any and all of the proposals or issues submitted by any of the parties. The appellant's chagrin with the result should not prompt disparaging innuendoes.

1) *There is no Ambiguity in the Executive Order.*

At page 15 of appellant's brief it argues that there is ambiguity in the legal description fixing the boundaries of the reservation, as contained in the Executive Order. Asserting ambiguity in the legal description as its premise, it then urges in the next succeeding several subdivisions of its argument that all uncertainties should be resolved in favor of the Indians, that the Indians at the time of the Treaty understood they were getting the tidelands, that they needed the tidelands for their sustenance, and that accordingly the tidelands should

be included now within the reservation boundaries. If the premise fails, all of the succeeding argument falls with it.

Largely, appellant's argument concerning ambiguity is concerned with the mouth of the Skokomish River. But the condition of the river, whether broad or narrow, or one or more channels, is not of real significance. The important boundary that we are concerned with is the boundary along the shore of Hood's Canal. Does that boundary stop at high water, or does it extend to low water? It is the area encompassed between those two lines—the tidelands—that we are concerned with. In respect of this area the Executive Order legal description reads:

> ". . . thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning."

The Executive Order was issued in 1874 (Ex. 4). At that time, and in fact since 1864, the date of the decision in *U.S. v. Pacheco*, 69 U.S. 587, 17 L. Ed. 865, the law of the land was that when a "call" in a legal description reads to a body of water, or along the shore of a body of water, that the boundary is at the high water mark. The act of an executive is presumed to have in contemplation the existing law. There is, therefore, no ambiguity in the legal description of the Skokomish Indian Reservation as contained in the Executive Order. The boundary of that reservation is along the high water mark of Hood's Canal. It does not include the tidelands.

2) *The State Court Action is Res Adjudicata.*

On the previous appeal in this cause, *Skokomish Indian Tribe v. France*, 269 F. 2d 555, the appellees Nalley ontended that a prior action filed in Mason County, Vashington, was Res adjudicata at least as to the Indian tribe and the defendants Nalley. In considering his contention, this court stated at page 559 of that pinion as follows:

> "... If in the further proceedings before the district court it is determined that as to some parcels or some appellees a prior state action involving substantially the same issues is pending, an appropriate order dismissing the action as to such parcels or appellees, or holding the action in obeyance as to them, may be entered."

In the subsequent trial of this action a certified copy the State Court record was admitted in evidence Ex. A-6). This record consists of the Summons and omplaint, Proof of Service upon the Skokomish Indian ribe, and an Order of Default against the Indian tribe, l in the State Court action. That record shows that ne plaintiff in the State Court action, Charles T. Vright, is one of the defendants in this action. It also nows that the appellant herein, the incorporated Skopmish Indian Tribe, Marcus Nalley and wife, and the ity of Tacoma, among others, are all defendants in ne State Court action. So, as to the appellant herein, nd the appellees Nalley and City of Tacoma, they are l parties to the Mason County action.

That portion of the tidelands involved in this suit, nd claimed by appellees Nalley, are the tidelands abutng on Government Lots 3 and 4, Section One, Townnip 21 North, Range 4 West, W.M. (Par. 5 of Admitted

Facts of Pretrial Order, Pretrial Order p. 25-27, Supple mental Transcript). As to the identity of these tideland in the Mason County action, compare paragraph XXXI and XXXIII of the Complaint in that actio (Ex. A-6).

That the issues in both cases were identical, or sub stantially so, compare the prayers of the respective com plaints. In the State Court action the prayer reads, i part (Ex. A-6):

> "1. That the boundaries of the various parcels c tide lands held by the parties hereto and lying i front of, adjacent to, or abutting upon the upland held by the parties hereto be established and pro perly marked.
>
> 2. * * * * *
>
> 3. That the title of the plaintiff and the defer dant [s] respectively be quieted in their respectiv parcels of tidelands in accordance with the bound aries to be determined and established by th court in this action."

The prayer of the Complaint in the instant caus reads in part as follows (Tr. 5 to 23):

> "1. That this Court quiet title of said plaintiff i and to the above-described lands, and that th defendants herein be forever barred and estoppe from claiming any right or title in and to said lands

See also paragraph XIII of the Complaint here (Tr. 5 to 23).

The trial court in this action made findings to th effect that the appellant and the appellees Nalley an City of Tacoma were all parties to the Mason Count

ction, that as to the defendants, Nalley, the tidelands nvolved in both actions were identical, and that the sues involved in both actions were substantially the ame. (Finding of Fact 39 to 41; Tr. 96-97). On the asis of these findings the court concluded that the Iason County action, having been prior in time to ne present action, was Res adjudicata as between the ppellant and the appellees Nalley, and that as to Nalley ne action should be dismissed. (Conclusions of Law 7 to 19; Tr. 100). There was no contrary evidence, nd of course the record in the Mason County action Ex. A-6) supports the court's findings and conclusions.

The rule in Washington is stated in *Dolby v. Fisher*, Wn. 2d 181, where the court says at p. 189:

> "We can agree with appellant that the general rule is that the plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and this regardless of whether the defendant appears and defends or allows the judgment to go by default."

Appellant's argument on this proposition is two-ronged. First, it urges that the Mason County Super-r Court could not oust the Federal Court of juris-iction. That argument misconceives the effect of a 'ea of *res adjudicata*. That plea does not question the urt's jurisdiction, but merely asks the court to rule pon that particular plea. This, the District Court did, dversely to the appellant's position.

Second, appellant urges that the Superior Court ha no jurisdiction because the United States was an indis pensible party and was not joined in that suit. This cour held that the United States was not an indispensibl party to this litigation. (p. 560 of the prior opinion) I the United States is not an indispensible party in thi litigation, where these particular parties, these particu lar tidelands, and the issues are identical, it is difficul to know why it would be an indispensible party in th State Court action. The appellant's brief gives no rea sons why there should be a different rule in the tw courts.

The only remaining question concerning this propo sition, is whether the Superior Court for Mason Count had basic jurisdiction over the tidelands involved i that litigation. The only case referred to by appellan on this proposition is *United States v. Candelaria*, 27 U.S. 432, 70 L. Ed. 1023 (Appellant's br. 36). The onl part of the *Candelaria* case which favors appellant, i its holding that a State Court action involving India lands would not be binding upon the United State Government, if it were not a party to the action. Tha question is no longer involved here. Upon the basic ques tion of whether or not the State Court has jurisdictio over Indian lands, *Candelaria* says it does have suc jurisdiction.

In that case two questions were certified by the Ci cuit Court for answer. The second question submitte is as follows (at page 1025 of the Law Ed. Report):

> "2. Did the state court of New Mexico have juri diction to enter a judgment which would be re

judicata as to the United States, in an action between Pueblo Indians and opposed claimants concerning title to land, where the result of that judgment would be to disregard a survey made by the United States of a Spanish or Mexican grant pursuant to an Act of Congress confirming such grant to said Pueblo Indians?"

The court answers this question at page 1027 as follows:

"Coming to the second question, we eliminate so much of it as refers to a possible disregard of a survey made by the United States, for that would have no bearing on the court's jurisdiction or the binding effect of the judgment or decree, but would present only a question of whether error was committed in the course of exercising jurisdiction. With that eliminated, *our answer to the question is that the state court had jurisdiction to entertain the suit and proceed to judgment or decree.* Whether the outcome would be conclusive on the United States is sufficiently shown by our answer to the first question." (emphasis added)

This court has also recognized the basic jurisdiction of a State Court where title to Indian lands is involved, in the case of *Bonds v. Sherburne Merchantile Co.*, 169 Fed. 2d 433; Certiorari denied, 335 U. S. 899, 93 Law Ed. 434. In this case an Indian allottee had mortgaged her allotment. Thereafter the mortgage was foreclosed in a State Court proceeding. Subsequently, the mortgagee also in a State Court, had his title quieted against the Indian allottee. The present action was brought by the Indian allottee in Federal Court to quiet the title to the same allotment. This court held that she could not collaterally attack the State Court judgment, saying at page 437:

> "Nor can appellant in a federal court collaterally attack the state court judgment because there were other ground for invalidity of its quieting the title, not presented in that case.
>
> "Appellant was competent to sue in her own right in the Montana State Court and is not entitled to have her case tried anew in this federal proceeding."

See also, *Hutchins v. Pacific Mutual Life Insurance Co.*, 97 Fed. 2d 58 (CCA 9).

CONCLUSION

It is respectfully submitted that the Decree of the trial court should be affirmed.

GORDON, GOODWIN, SAGER & THOMAS
Attorneys for Appellees, Frances Nalley and Puget Sound National Bank, as Executor of the Will and Estate of Marcus Nalley, deceased.

By HARRY SAGER

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRY SAGER

No. 17933

United States Court of Appeals
For the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant,*

vs.

E. L. FRANCE, TRUSTEE, *et al., Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION NO. 1183

BRIEF OF APPELLEE SIMPSON LOGGING COMPANY

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION NO. 1183

BRIEF OF APPELLEE SIMPSON LOGGING COMPANY

GENERAL STATEMENT

Appellee SIMPSON LOGGING COMPANY is in essentially the same factual and legal position as appellees, Hulda S. Carlson, et al. Appellee is concerned with a stretch of tideland located in Section 26. This section has a separate and different history, having been part of the Fisher Homestead and not part of the original reservation. The importance of this difference is fully discussed in the brief submitted by appellees Carlson, et al., and appellee Simpson Logging Company hereby adopts specifically their "Nature of the Case" statement, and argument with respect to the Fisher Homestead. Further, it is the understanding of this appellee that the briefs submitted by the other appellees will cover and set forth

specific portions of the record supporting the trial court's findings of fact. Accordingly, this task will not be undertaken extensively herein.

BURDEN OF PROOF

Appellant's specifications of error numbers 1 through 35 are to the effect that the trial court erred in entering findings of fact numbers 4 through 8, inclusive, 10 through 16, inclusive, 18 through 24, inclusive, 26, 28 through 32, inclusive, 34 through 38, inclusive, 40, 41, 43, 45 and 46. The trial court's findings of fact are presumably correct and will not be set aside unless clearly erroneous. (Rule 52a of Federal Rules of Civil Procedure). Consequently, an appellant seeking to overthrow the findings has the burden of presenting a proper record to the Court of Appeals showing the evidence compelled a finding in his favor. See *Watson v. Button*, 235 F.2d 235 (9th Cir. 1956), *United States v. Foster*, 123 F.2d 32 (9th Cir. 1941), *Grace Bros. v. C.I.R.*, 173 F.2d 170 (9th Cir. 1949), and *Los Angeles Shipbuilding & Drydock Corp. v. U. S.*, 289 F.2d 222 (9th Cir. 1961).

The appellant's mere challenging of the findings does not cast the onus of justifying them upon the Court of Appeals or the appellees. The appellant, in seeking to overthrow these findings, has the burden of pointing out specifically where the findings are "clearing erroneous." See *Glen Falls Indem. Co. v. U. S. ex rel. and to Use of Westinghouse Elect. Supply Co.*, 229 F.2d 370 (9th Cir. 1955). Rehearing denied 1956. Appellant has failed to meet this burden.

Appellant refers to very few specific portions of testimony by witnesses, and the accuracy of some of these references is questionable. For example, appellant on pages 19-20 of its brief states:

> "We particularly recommend some delightful testimony by Mrs. Louise Pulsifer and Mrs. Emily Miller . . . the latter testified that often when she was a little girl she caught sole on the tidelands by walking in shallow water until she stepped on one, whereupon she promptly captured it." (Tr. Pg. 281, 282)

Mrs. Miller's testimony with respect to flounders (the word sole was not used) was actually as follows:

"Q. And did they eat flounder?

A. Yes, flounders. That is a lot of fun for me.

Q. Now, tell us about that.

A. He (her father) used to go down to the Wilson Slough, they call it, we would go down in the summer time and take a long gillnet and set it right across the mouth of the creek in the summer time, and when the tide went out, my sister and I used to go out and grab great big flounders and make one or two flops, and we would be down in the mud. But that was a lot of fun."

The appellant's version of the testimony places the event on the tidelands and states the sole were stepped on by the witness. Actually, the witnesses story concerns the mouth of the creek and relates how, as children, they would grab the flounders stopped by their father's net.

Again on page 41 of the brief, appellant supposedly refers to a specific portion of the testimony.

> "During the depression, for example, hordes of Indians wandered over the area." (Tr. Pg. 486)

The pertinent testimony on page 486 of the transcript is as follows:

"Q. Now do you remember the depression?

A. I sure do.

Q. By that time you were married and had your children?

A. Yes.

Q. How much use of the tidelands in front of the reservation did the Skokomish Indians make?

A. Well, they at that time, to my knowledge, from Potlatch up to Nalleys, or what they call — what is called Nalleys now, around the flats we called it then.

Q. Well, I don't mean the extent of the ground, I mean the number of people.

A. Well, I guess all of us were down there."

The appellant has stated conclusions in its brief and has made general sweeping references to the record, but this does not sustain the burden of pointing out specifically where the findings are "clearly erroneous".

In most every case there is a key or crucial issue which if resolved one way, makes it necessary for the court to consider many additional issues, but if resolved the other way renders consideration of the other issues unnecessary. This case is no exception. The appellant, having taken the approach it has to this case, has made the question of the Indians' understanding at the time of the Treaty just such an issue.

The appellant at the trial court level had the burden o

proving it was the understanding of the Indians that, under the Treaty, they were to receive the tidelands in question. Apparently, appellant has recognized it could not prove this by direct evidence for appellant has relied upon the "environment" argument which requires proof of the following:

(1) The tidelands in question were essential to the Indians' livelihood, and

(2) accordingly, it must have been the understanding of the Indians that they were to have the tidelands in question.

Appellee does not concede that, even if such were the case, the reservation could now be expanded beyond the established boundaries. However, the trial court, as shown by its findings of fact, found contrary to appellant's position, and accordingly, consideration of the other issues was actually unnecessary. Now at the appellate court level the appellant has the burden of showing that said findings were "clearly erroneous." Appellant has failed to do so, and consideration of other issues is unnecessary.

The suggestion of appellant that the tidelands impliedly must be regarded as having been a part of the area assigned for reservation purposes because the subsistence of the tribe was dependent upon the use of the beach, and particularly for shell fish, is not borne out by the facts.

The treaty itself and the available evidence of matters leading up to the treaty contain virtually nothing to justify the thought that shell fishing, particularly at this location, was significant.

Article IV of the Treaty (Exhibit 3) contains the only reference to shell fish and that is as a specification that the Indians "shall not take shell fish from any bed, staked or cultivated by citizens." The same Treaty, again in Article IV, in the only reference to fishing, states "the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens . . ." Access to shell fish was not a matter which drew particular comment.

The minutes of the meeting of Governor Stevens with the Indians at Point-No-Point on January 26, 1955, Exhibit 10, reflect no reference to shell fish. On page 2 of the typewritten transcript in evidence, the first Indian to speak was a Skokomish who said: "I wish to speak my mind as to selling the land, great Chief! What shall we eat if we do? *Our only food is berries, deer and salmon.* Where then shall we find these? I don't want to sign away all my land, take half of it and let us keep the rest."

The second of the Indians to speak said he did not want ". . . to leave the mouth of the river."

Following this protest the interpreter, Mr. Shaw, explained they were not called upon to give up their old modes of living and places of seeking food but only to confine their houses on the reservation.

After a similar protest by Hool-Hole-Tan, Mr. Simmons the agent, explained if they kept half their country, they would have to live on it and would not be allowed to g

anywhere else they pleased. However, if a small tract was reserved for the reservation they would have the privilege of going wherever else they pleased to fish.

Following this explanation, the Duke of York said: "My heart is good. I am happy since I have heard the paper read and since I have understood Gov. Stevens, particularly since I have been told that I could look for food where I pleased and not in one place only." Again he says: "We are willing to go up the Canal since we know we can fish elsewhere. We shall only leave there to get *salmon* and when done fishing will return to our houses."

Any argument with respect to the Indians' understanding based on "environment" is answered by the Indians being granted the right to fish at their usual and accustomed grounds and stations.

The ownership of the tidelands was not important to the Indians, the right to fish at "usual and accustomed grounds and stations . . . in common with all citizens of the United States . . ." was important. This being solely an action to try title to the tidelands, the question of fishing rights is not involved.

AMBIGUITY – SURVEYS

Appellant, on page 15 of its brief, argues that the words "along Hood's Canal" used in the executive order were ambiguous. This is inconsistent with appellant's acceptance of the trial court's finding of fact No. 3, to wit:

> "The executive order defines the boundary of the reservation along Hood's Canal as 'thence southerly and easterly along said Hood's Canal to the place of beginning.' The executive order *does not describe the tidelands* in issue in this case, *nor purport to include the same* in the description of the reservation. (Exhibit 4)." (emphasis supplied)

By acceptance of the above finding and finding of fact No. 2, to wit: "the Treaty (Exhibit 3) does not describe the tidelands in issue"; appellant has precluded itself from arguing ambiguity.

Further, as can be seen by the above findings of fact appellant's statement on page 3 of its brief:

> "it was to the proximate *tidelands* that they were relegated by the Treaty." (emphasis supplied)

is unfounded.

The case of *Northern Pacific Ry. Co. vs. United States* 227 U. S. 355 (1913), cited by appellant, is distinguishable. There, the Treaty itself described the western boundary as ". . . thence southerly along the main ridge of said mountains . . ." (Cascade Mountains). The court found the evidence was clear as to the understanding of the Indians and that the subsequent survey did not extend to *the* main ridge, but rather to a lesser ridge. Accordingly, the survey was set aside and a subsequent survey, which did extend to the main ridge, was confirmed.

However, in the present case the Treaty clearly provided the reservation would thereafter be surveyed and set aside. The executive order did so. As admitted by appellant, neither the Treaty nor the executive order

described or purported to include the tidelands in question. The total and specific area contemplated was included in the survey and executive order, and the tidelands in question were not a part thereof. There is no ambiguity.

STATUTE OF LIMITATIONS
and
DOCTRINE OF LACHES

Appellant's Exhibit 42 diagrams the various sales made by the State of Washington to private owners and users. These acquisitions began around 1901 and other early dates appearing are 1909 and 1911. The admitted facts in the pre-trial order show a series of State of Washington conveyances. In the region abutting section 26 these generally ran in favor of Potlatch Commercial and Terminal Company, a predecessor of Phoenix Logging Company, which in turn is the predecessor of appellee Simpson Logging Company.

The exclusive right to these tidelands asserted by these several grantees of the State of Washington, particularly the logging company, was manifestly widely known and the continued use and occupancy of such tidelands by the appellees dates therefrom. The witness, Fred Snelgrove, showed these operations started around 1900, according to the records of his company (Tr. 764), and involved the use of the tidelands for docks, dumps, sorting, rafting,

booming and the storage of logs over virtually the entire frontage of Section 26 (Tr. 766-7). Old piling marking these former operations appear in photographs A-3-8, pages 5 and 6, which can be compared with the photograph A-60. With respect to this appellee, the evidence is certainly clear as to occupancy and use.

Further, by the admitted facts in Article VII of the pre-trial order, page 36, it is clear the several appellees and their predecessors have been paying all of the taxes levied for many years on the tidelands and since the time of acquisition.

On the other hand, the Skokomish Indians over the intervening thirty to forty years, and the appellant incorporated tribe for approximately ten years after its incorporation, raised no question as to appellee's title until it suddenly filed this quiet title action.

Appellee contends appellant's claim is barred by the statute of limitations and the doctrine of laches. Appellee relies on RCW 7.28.050, .070 and .080. RCW 7.28.050, in substance, provides that all actions brought for the recovery of lands of which any person may be actually, openly and notoriously possessed for seven years under title deductible from the State, shall be brought within seven years after the first possession being taken. RCW 7.28.070, in substance, bars any claim as against a person who has paid taxes on land for seven successive years while he has been in actual, open and notorious

possession of the land under claim and color of title. RCW 7.28.080, in substance, provides every person having color of title in good faith to vacant and unoccupied land and pays taxes thereon for seven successive years shall be adjudged the owner thereof.

Clearly appellant's claim would be barred by the facts and terms of the above statutes. Appellant, however, contends that the statute of limitations and the doctrine of estoppel or laches are not applicable to claims of Indians, regardless of how long they delay in pressing a claim, and regardless of the equities of intervening innocent third parties.

No party claims laches or limitations run against the United States. But the United States is not a party to this action, and, in fact, has refused to become a party or to participate in the prosecution of this case. The cases cited by appellant merely show the United States is not bound by limitations or laches; in each instance the United States was asserting a claim. As admitted by appellant on page 32 of its brief, the cases they have cited "are in form ones brought by the United States as plaintiff for its ward." This does not resolve the question of whether the Indian tribe independently is immune from the statute of limitations and the doctrine of laches. Appellant, on pages 27 through 32 of its brief, sets forth substantial portions of its corporate charter and constitution. Section 1 thereof provides in part that the tribe is hereby "chartered as a body politic and corporate of the United States of

America." Section 5 (i) thereof provides in part that the corporate body has the power to sue and to be sued. These portions are inconsistent with and refute appellant's claim of immunity.

The Indians have not been in possession of the tidelands in Section 26, nor wandered over the same at will (Tr. 321-323, 446-450, 464-465). These areas have been occupied and used by appellees and their predecessors long before it was incorporated and continuously since. (See previous discussion as to occupancy and use of subject tidelands by appellees and their predecessors.) The Indians, with varying success, have been excluded from these beach areas since early in the century when the State first started selling the tidelands (Tr. 321-323, 446-450, 464-465). The Indians themselves had been allotted the uplands along this tideland strip, and they had already sold these uplands to appellee's predecessors pursuant to appropriate approval of the United States and proper Indian officials (Hanson map, Exhibit A-59; Admitted Fact VI, Exhibit A-21; A-64; A-25 to A-35; and A-2).

Appellee's position is that, while it may be proper not to apply statutes of limitations or the doctrine of laches to the United States, it does not follow that the court should adopt a hard and fast rule that under no circumstances should an Indian or a corporation succeeding to Indian rights be barred from asserting claims regardless of how stale or inequitable. The reason for the rule in connection with the United States is it is assumed the

government will act wisely and with discretion in pressing old or oppressive claims. This certainly could not be the justification for applying the rule contended for by appellant. Appellant's position can only be founded on the proposition that the Indians should be encouraged to press their claims whether stale or not, and regardless of the oppressive or harsh result to an innocent non-Indian.

Appellee's position finds support in the law.

Felix v. Patrick, 36 Fed. 457 (C.C.D. Neb. 1888), affirmed 12 S. Ct. 862, 145 U. S. 317, was an action to recover land based on fraud. The plaintiff heirs of a half-breed Indian were held to have not sued within the period of limitations and were therefore barred by laches. In so holding the court stated at page 461:

> "But it is earnestly contended that a different rule should be applied in this case because plaintiffs and their ancestors were Indians; that the law is very tender in respect to the rights of such persons, who are not familiar with our laws and methods of transacting governmental or private business, and were ignorant of the disposition which had been made of the scrip. And it is also urged that as Indians they were the wards of the government, and could not have asserted their rights to the property, even if they had known what their rights were. It is not shown that they were not persons of education and intelligence, or that they were not in fact familiar with the land laws, and the methods of governmental business, or that they were not in fact as competent to look after their rights as any person . . ."

and at page 462:

> "At any time during the last 27 years these plain-

> tiffs or their ancestors could have come into the courts of Nebraska and asserted their rights . . . The means of knowledge were open before them. They had the right to sue, and the courts would have given them full protection. It would savor little of equity to permit them to come in now and take from these many defendants, most of whom are innocent of any intentional wrong, property of such enormous value, on the ground that their ancestor 28 years ago was swindled out of scrip of such trifling value — a million dollars today for one hundred and fifty dollars 28 years ago. I cannot believe that equity demands or even tolerates this . . ."

This case was affirmed by the Supreme Court of the United States without ruling expressly on the laches question but the court did rule that plaintiff failed to set out facts which would indicate plaintiff was not guilty of laches.

In *Pope v. Falk*, 66 Kan. 793, 72 Pac. 246 (1903) (appeal dismissed 20 S. Ct. 761, 201 U. S. 651), the court held the plaintiff Indian was precluded by the doctrine of laches and stale claim from asserting title to land on the basis that the deed to his first grantee was not approved by the Secretary of Interior. In so holding that the claim was barred after the lapse of 30 years, the court stated:

> "If after the lapse of 30 years, the Indians and their grantee are not barred strictly under the statute of limitations, they are precluded from the enforcement of their claim under the doctrine of laches and stale claims, set forth in the opinion of this court in the case of *R. R. Dunbar et al v. Sanford M. Green et al* (just decided) 72 Pac. 243."

In *Dunbar v. Green*, 66 Kan. 557, 72 Pac. 243 (1903) he court held the Indian claimant of land was barred rom asserting, after a delay of 21 years, that the probate ourt lacked jurisdiction to order a sale of the land when he claimant was a minor. The land involved was pat-nted to the Indian claimant's mother pursuant to a treaty. The court assumed the deed was void but still dismissed he Indian's claim stating at page 245:

> "And we also approve on principle the doctrine that the fact that a litigant is a tribal Indian is not a complete bar to the defense of laches, although it is to be taken into account in determining the effect of his inaction. Whenever this defense is invoked, there must be a consideration of all special circumstances of the case. The mere extent of the delay is one item to be considered. Among others are any change of conditions, the intervention of the rights of third parties, the likelihood of other interests being affected by the delay, the presence of fraud and its character, the diligence required to discover it, and so on . . . His being an Indian entitles him to more liberal treatment in the matter just so far as it is an indication of his inferior capacity . . . To go further, and hold that it gives him absolute immunity from the consequences of his own neglect, would be to make it a means of injustice towards others, rather than of protection to himself . . . Apart from the mere fact of the claimant being an Indian there is nothing to excuse the delay in this case . . ."

This case was reversed in 25 S. Ct. 620, 198 U. S. 166, on the ground that the non-Indian brought the action and had neither title nor possession, and therefore had to prevail on the strength of his own title. The court, however, appears to state that, had the Indian brought the action, laches and the statute of limitations might not

have been a good defense.

It is submitted that based on the reasoning of the foregoing cases, appellant should be subject to the bar of the statute of limitations and the doctrine of laches or estoppel the same as any other citizen or corporation, for the following reasons, inter alia:

(1) Appellant is a corporation having the powers of a corporation to sue and be sued (Appellant's brief page 32, Exhibits 1 and 2). There is no showing that the corporation is in need of any more protection of its rights than any other corporation.

(2) There has been no showing that the Skokomish Indians are uneducated, ignorant or unfamiliar with governmental affairs. As a matter of fact, one would conclude a contrary situation existed from the caliber of the Indian witnesses who testified. Considerable point was made of the prominent position of one of the incorporators, who was in the State Legislature for many years (Tr. 439).

(3) Appellant corporation was incorporated by 1938 and not later than the year 1939 (Exhibit 1). Appellant claims to have the right to maintain this quiet title action, yet with that right to address its grievance to the court it delayed more than nine years in doing so.

(4) The Indians and their predecessors, whom appellant corporation claims to represent, could have commenced this action from thirty to forty years before it did.

(5) Many of the appellees acquired their interests in the tidelands for a valuable consideration after appellant was incorporated, and all appellees ac-

quired their interests after the Skokomish Indians could have commenced an action to establish their title.

(6) All appellees claim a bona fide purchase from Indian allottees who sold their allotments with proper approval for valuable considerations. (Admitted fact VI)

(7) There is no doubt that all of the appellees are innocent purchasers and there is no question of fraud, bad faith or overreaching.

(8) Appellant has made no attempt to explain or justify the delay in commencing this action.

Appellee therefore submits appellant should be required to abide by the same rules of justice and fair play as any litigant before the court. The various disabilities, if any, of appellant should only be considered as one element in determining whether the long delay in bringing this action was excusable. To adopt the rule that appellant is immune from its own neglect would not be necessary for reasonable protection of appellant's rights and would work a serious injustice to the many innocent appellees.

CONCLUSION

This appeal should be dismissed and the decision of the trial court affirmed. The findings of fact challenged by appellant are supported by the evidence. Appellant has failed to sustain the burden of showing said findings

to be "clearly erroneous." This issue alone resolves this case. However, appellee maintains the additional arguments made in its brief and the briefs of other appellees are also well taken, and fully answer and dispose of the arguments made by appellant.

Respectfully Submitted,

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March 15, 1963

No. 17933

United States Court of Appeals

FOR THE NINTH CIRCUIT

SKOKOMISH INDIAN TRIBE, *Appellant*,

vs.

E. L. FRANCE, TBUSTEE, *et al.*, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION NO. 1183
THE HONORABLE GEORGE D. BOLDT, *Judge*

BRIEF OF APPELLEE CITY OF TACOMA

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BRIEF OF APPELLEE CITY OF TACOMA

NATURE OF THE CASE

Inasmuch as there are four briefs being filed by the appellees in this action, a restatement by each of the appellees would serve only to lengthen unduly the briefs and records in this cause, the appellee City of Tacoma therefore adopts the statement of the nature of the case set forth on pp. 1 through 4 of the Brief of the Appellees Hulda S. Carlson, et al., heretofore filed in this cause, with the following supplemental statement.

The interest of the City of Tacoma in and to the land in dispute was acquired for and is presently used as a part of a hydroelectric project furnishing electric power to the City of Tacoma and its inhabitants. The

installations in the main consist of a portion of the tailrace from the powerhouse located on the uplands, together with high tension transmission lines across portions of the area in question. (Tr. 583-607, incl.)*

A portion of the City's facility is located in Section 26, referred to throughout these proceedings as a portion of the Fisher Homestead or Fisher Donation Land Claim. The facilities of the City of Tacoma were duly licensed by the Federal Power Commission and bear license No. 460. (Tr. 591; Defendants' Ex. A-61.) The facilities in question were constructed from the period 1923 to December 31 of 1930 (Tr. 584, 585) and have been in continuous operation ever since that time, which dates, incidentally, antedates substantially the filing of the Complaint in the above-entitled action and, as a matter of fact, antedate the organization of the Skokomish Indian Tribe under a constitution and bylaws adopted by the Tribe on April 2, 1938. (App. Br. p. 27; Ex. 1 and 2.)

ARGUMENT IN ANSWER TO APPELLANT

The appellee City of Tacoma asserts in defense of the above-entitled action and in support of the trial court's findings most of the same defenses of the other appellees. In order to avoid needless and undue repetition, this appellee therefore adopts the arguments in answer to the appellant contained in the Brief of appellees Hulda S. Carlson, et al., as set forth in pp. 5 to 31 of said Brief. In addition to the adoption of said argument, however, this appellee would expand

*All reference to Transcript pages are to page numbers at top of the page of Volumes II and III.

upon one issue of the argument set forth therein, that is, the Indian use and occupancy of the land in question in ancient times; and further, would and will assert an argument peculiar to this defendant, that is, that the claim of the appellant constitutes an impermissible collateral attack upon the decision of the Federal Power Commission in setting forth and granting the terms and conditions of the Federal Power License to the appellee City of Tacoma, and that the submission by the City at the time of construction of its hydroelectric facilities of the plans and specifications regarding the construction, the details of land acquisition of Indian lands in the Skokomish reservation, the proposed location of the facilities, and the subsequent approval thereof by the Secretary of Interior, acting by and through the Bureau of Indian Affairs, is res judicata and binding upon the predecessors in interest of and the appellants in this cause. The appellee will further demonstrate hereafter that the defenses of laches and estoppel are and should be available to this appellee because of the peculiar circumstances involved in the construction and maintenance of the hydroelectric project and the approval thereof by the United States Government.

INDIAN USE AND OCCUPANCY

The Brief of appellees Hulda S. Carlson, et al., on pp. 14 through 17, incl., dwells on the question of Indian use and occupancy. The evidence and testimony cited in that portion of the brief establishes conclusively that the Skokomish Indians were river people concerned with living on rivers and creeks where

salmon would run. That portion of the brief further demonstrates that the Indians did not rely upon the tidelands in question for the procuring of shellfish sufficient to meet their needs. As a matter of fact, not only the writings of Professor Elmendorf, but the testimony of the appellant's witnesses in the trial of this cause, demonstrate conclusively that with reference to the procuring of shellfish the Skokomish Indians were nomadic in nature. That is, they would procure shellfish at many and various locations, most of which were far removed from the lands in dispute. The appellee City of Tacoma believes that a somewhat detailed relating of the evidence and testimony of these witnesses will be of assistance to the court in arriving at the inescapable conclusion that the tidelands in question were not utilized, except occasionally, for the procuring of shellfish.

One of the first witnesses of the appellant was a Mr. Archie Adams. His testimony with reference to fishing, trapping, and digging clams, and the location of such activities is as follows:

> "Well, away from the mouth of the river, across the bay, and all the way up the Canal." (Tr. 56, lines 12, 13.)

And Mr. Adams testified with reference to the taking of herring prior to the coming of the white man in response to a question as to where the Indians took them:

> "Oh, mostly Union." (Tr. 75, line 24.)

And, in answer to a question as to where his grandfather fished and trapped, he stated:

> "Yes, practically all over the canal there in canoes." (Tr. 96, line 15.)

And Mr. Adams, when questioned concerning his digging of clams in Hood Canal, stated that a good clam digging area was at the far end of the Canal where the Union River enters the Canal. (Tr. 113, 114.)

The witness, Emily Purdy Miller, testifying concerning the procuring of butter clams, in response to a question as to where people dug butter clams, stated:

> "There was not only one place, but they went where there was the most clams, because there have to be enough to smoke. That is all along the beaches wherever there is the best place, you see a bunch of people there just digging." (Tr. 168, lines 16 to 20.)

And Mrs. Miller testified concerning her digging of clams as a young woman, stating that she dug in various places wherever she could find a nice place that she could dig and where she could get the most clams (Tr. 194, 195), and testifying concerning the olden days, she stated that the places they used to go in the winter time to get raw clams was up to and beyond the town of Union, that the Indians wanted to get clams easily and to get the good ones and they would go east from Union city, that some of the clam beds were a few miles east of the reservation and the Indians went there by canoe, that she herself had gone up by canoe in this area. (Tr. 206.)

The testimony of Mrs. Louise Pullsifer, one of the oldest living members of the Skokomish Tribe, also

bears out the contention of the defendants that the procuring of clams and shellfish by the Skokomish Indians was nomadic in nature, that is, the Indians ranged from one end of Hood Canal to the other, digging and procuring clams and shellfish at those spots where the same were most easily procured. Mrs. Pullsifer testifying concerning the procuring of ducks and clams stated:

> "There is lots of places where they used to go and dig their clams and get their ducks. Of course, the ducks was just full around that canal up to Belfair, clams all around that place where all the Indians used to travel around there from Skokomish." (Tr. 278, lines 21 to 25.)

and again, in response to a question as to when the people went up towards Belfair:

> "Yes, for fishing and ducks and clams towards Belfair." (Tr. 290, line 5.)

She further testified that salmon was the main food fish that the people ate in the days when she was young. (Tr. 290.) And again, in response to the following question:

> "Do you remember that the best clam beds were east of Union up towards Belfair?
>
> "A. Yes, towards." (Tr. 290, lines 22 to 24.)

She further testified that in the early days her family went down to a town called Port Gamble. They used to go by canoe. They would stay two or three months, working in the mill, and during this time those who were not employed in the mill would fish and dig clams. That there were good clam beds all over the Port Gamble area. (Tr. 299.)

The excerpts set forth in full are but a few of the many statements of the witnesses, all of whom conceded that the Indians ranged up and down Hood Canal from the closed end of the Canal near the present town of Belfair toward the mouth of the Canal in the vicinity of Quilcene in order to procure shellfish. Indeed, the actions of the ancient Indian were not in the last analysis much different from the acts and actions of the present-day sportsman, that is, traveling to the place, irrespective of where it may be, where the game or food sought is most abundant and most easily procured. There is no evidence whatsoever by any witness that the tidelands here the subject of dispute furnished the most abundant and most readily available supply of shellfish. Quite the contrary appears. We wish to suggest that the testimony of these witnesses with reference to the best clam beds being near Belfair and further up the Canal substantiates in a large measure the testimony of Dr. Jerome E. Stein (Tr. 451), regarding his study of clams in the area in question and the effect of the fresh water from the Skokomish River on the salinity of the waters of Hood Canal and its adverse effect upon the abundance of clams in the area.

Dr. Stein testified that he made a careful scientific study of the tidelands here in question for clam life. He actually made "digs" for clams throughout the area involved at more or less regular intervals of fifty yards, at a time when the tide conditions were relatively favorable. (Tr. 581.) He made a total of 134 "digs" ranging in area from one square foot to two square yards. Of the total number of "digs" only fif-

teen produced any clams whatsoever. (Tr. 586.) He also stated that in his professional opinion, the relative scarcity of clams in this area would not be materially changed between the time of the treaty and the time of his investigation. (Tr. 630.)

Exhibit A53 is a summary chart of the results of Dr. Stein's investigation. It shows the number of each variety of clams found in each dig, the digs being identified as "sample no.," and by reference to Exhibit A51, the location of these digs can be determined. The total number of clams found by Dr. Stein was 309 from all of the 134 digs. However, of this total number only the rock clams and butter clams were native to the area—the other varieties being imports brought in around the turn of the century. The total native clams found in all of these digs was only 36. The testimony of the Indian witnesses as to their own clam digging would have little weight in view of Dr. Stein's investigation, since, of course, they didn't know whether they were digging native or imported clams.

STATE ACTION RES JUDICATA

The appellee City of Tacoma and the appellee Marcus Nalley, as well as several other parties to this proceeding, were named defendants in an action instituted by Judge Charles E. Wright to quiet title to certain of the lands here in question, which action was at the time of the trial of this case still pending in the Superior Court of the State of Washington. The appellee City of Tacoma submits that the State court had first assumed jurisdiction of the lands in question, and hence this proceeding was barred or should have

been stayed. The appellee City of Tacoma hereby adopts by this reference, in order to avoid repetition, the arguments set forth in the Brief of the appellee Marcus Nalley.

PROCEEDINGS BEFORE THE FEDERAL POWER COMMISSION ARE BINDING UPON THE APPELLANTS

As the evidence in this cause has indicated, the appellee City of Tacoma has constructed as part of its publicly owned electric utility a power arch dam, powerhouse, tailrace, and transmission line facilities in the area of and upon the land in question. The part of the project covering the lands in dispute consists in the main of the tailrace from the powerhouse and transmission line facilities.

At the very outset, it might be noted that the use of the property by the appellee City of Tacoma did not and does not interfere substantially with, nor is it inconsistent with the use of the property as testified to by the witnesses of the plaintiff. The evidence indicates that the transmission lines, although high voltage lines, are some 50 to 80 feet above the surface of the ground and do not in any manner interfere with the gathering of shellfish, if any exist, or walking on the beaches and marshes in question. (Tr. 356.)

The appellee City of Tacoma operates its hydroelectric projects pursuant to authority granted municipal corporations in the State of Washington by the laws of the State of Washington, and particularly RCW 35.92 (formerly Ch. 80 RCW). RCW 35.92.050 provides as follows:

"A city or town may also construct, condemn and purchase, acquire, add to, maintain and operate works, plants, facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes, public and private, with full authority to regulate and control the use, distribution, and price thereof, together with the right to handle and sell or lease, any meters, lamps, motors, transformers, and equipment or accessories of any kind, necessary and convenient for the use, distribution, and sale thereof; authorize the construction of such plant or plants by others for the same purpose, and purchase gas, electricity, or power from either within or without the city or town for its own use and for the purpose of selling to its inhabitants and to other persons doing business within the city or town and regulate and control the use and price thereof."

In addition to this statutory authority, as to this particular plant the City of Tacoma further operates the same pursuant to the laws of the United States of America, as evidence by the issuance of a license to operate said plant by the Federal Power Commission. (Ex. A-61.) This plant has been in operation continuously since the 31st day of December, 1930. (Tr. 584.) The transmission lines across the portions of the property subject to this action were constructed prior to this time.

The construction, operation, and maintenance of hydroelectric projects over, along, upon, and across lands over which the United States has control or jurisdiction are subject to the provisions of the Federal Power Act. 16 U.S.C.A. 791(a), et seq.

16 U.S.C.A. 796 sets forth certain definitions for the purposes of the Federal Power Act, defining among other things the following words:

"(1) 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations,' as hereinafter defined;

"(2) 'reservations' means national forests, *tribal lands embraced within Indian reservations*, *military reservations*, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

"(7) 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

"(9) 'municipal purposes' means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

"(11) 'project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system,

> all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit"; (Italics supplied.)

The following sections of the Federal Power Act, namely, 16 U.S.C.A. 792, 793, 794, and 795, establish the Federal Power Commission, which body administers the provisions of the act. 16 U.S.C.A. 797 sets forth the general powers of the Federal Power Commission. These powers generally and, in some instances, specifically are as follows:

(a) To make investigations and to collect and record data concerning the utilization of water resources.

(b) To determine the original cost and the investment in licensed projects, to require filing of statements showing the actual cost, etc.

(c) To cooperate with the executive departments and other agencies of State or National Governments in the investigations.

(d) To make public from time to time information secured, provide for the publication of reports and investigations.

Paragraph (e) of Sec. 797 authorizes the Commission to issue licenses, providing as follows:

> "(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any

State or muncipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and *reservations* of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired,* and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license

> therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection." (Italics supplied.)

Subsection (f) authorizes the issuance of preliminary permits, enabling applicants for licenses to secure data and perform certain acts, and (g) provides that the commission on its own motion may order an investigation of any occupancy or intended occupancy of any lands over which Congress has jurisdiction, and to issue such orders as it may find appropriate and expedient, and in the public interest to conserve and utilize navigation and water power resources of the region.

Section 803 of Title 16 provides for the conditions of license generally and, among other things, in subsection (e) thereof provides that the licensee shall pay license fees. This section provides as follows:

> "(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of sections 792, 793, 795—818, and 820—823 of this title; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation

thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any

> license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period."

A reading of the statutes cited and quoted above clearly indicates that Congress has provided a procedure for the construction, maintenance and operation of hydroelectric projects over waters and lands within its jurisdiction, including tribal lands within Indian reservations. Assuming for the purposes of argument that the lands in controversy are, in fact, tribal lands, then there can be no question but what such lands are subject to the provisions of the Federal Power Act, and the Federal Power Commission, when all of the plans and specifications of the Tacoma project were before it, knew or should have known of the existence of the tribal lands. The Commission duly issued its license and provided such license fees as it felt proper in view of the existing circumstances at the time of the application. If the Federal Power Commission, at the time of the issuance of its license to the City of Tacoma, through error or inadvertence, overlooked the ownership of tribal lands, then the appellant's claim is and should have been against the decision of the Federal Power Commission, rather than against its licensee.

16 U.S.C.A. 825L provides the remedy for persons aggrieved by an order of the Federal Power Commission. This section provides that any person, state, municipality, or state commission aggrieved by an order issued by the Commission in a proceeding under this

chapter may apply for a rehearing within 30 days after the issuance of the order. Said section further provides in subsection (b) thereof that any party aggrieved by an order issued by the Commission may obtain a review of the order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, by filing in such court within 60 days after the order of the Commission a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Thus, it would appear that, had the Skokomish Indian Tribe felt aggrieved at the decision of the Federal Power Commission in issuing a license to the City of Tacoma for its project on the Cushman River, and had the Tribe felt that proper provision was not made for the compensation or damaging of tribal lands, or had the Tribe felt that the Commission did not properly hold that the tribal lands were, in fact, tribal lands, then this question should have been raised within 60 days after the issuance of the Federal Power Commission license by petition to the Court of Appeals of the United States.

The institution of this action is, we believe, a collateral attack upon an order issued by the Federal Power Commission where the Congress has, in fact, provided a proper remedy by writ of review to the Court of Appeals. This court should not entertain at this late date a collateral attack upon the issuance of a license by the Federal Power Commission.

The Supreme Court of the United States, in a recent case involving the City of Tacoma, discussed specifically the question of impermissible collateral attacks upon rulings of the Federal Power Commission and, in the case of *Tacoma v. Taxpayers*, 357 U.S. 320, 2 L.Ed. (2d) 1345, specifically held that any question which was raised or could have been raised in the Court of Appeals on an appeal from the order of the Federal Power Commission could not at a later time be raised in another court, inasmuch as these were impermissible collateral attacks, the court stating as follows:

> "We think these recitals show that the very issue upon which respondents stand here was raised and litigated in the Court of Appeals and decided by its judgment. But even if it might be thought that this issue was not raised by the Court of Appeals, it cannot be doubted that it could and should have been, for that was the court to which Congress had given exclusive jurisdiction to affirm, modify or set aside the Commission's order, and the state may not reserve the point for another round of piecemeal litigation by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court, which had exclusive jurisdiction of the proceedings and whose judgment therein, as declared by Congress, shall be final, subject to review by this court upon certiorari or certification."

May we summarize for the convenience of this court the chronological order of the events which transpired. Subsequent to the adoption of the Federal Power Act, the City filed its application for a license under this act (Ex. A-61), submitted maps of the section, one of which was introduced into evidence as Exhibit 55.

Some time later, in June, 1924, the Federal Power Commission issued a license to the City of Tacoma for Project No. 460 Washington. (Ex. A-61.) The issuance of this license under the law provided, or should have provided for annual license fees for the use of all lands owned by or under the jurisdiction of the United States of America, including all tribal lands within Indian reservations. No appeal was taken from the issuance of this license to the Court of Appeals as by law provided, and the license has been in existence for over 35 years.

It would seem at the present time that this action by the appellant is an attempt at this late date to collaterally impeach the issuance of the license and the order of the Federal Power Commission, in that the appellant now asks the court to determine that the appellee City of Tacoma has been for almost 40 years a trespasser upon certain lands of the United States which were reserved to the appellant for its use and occupancy. This question is one which the Federal Power Commission, at the time the license was issued, decided, or should have decided. It would seem clear that, if the appellant or its predecessors in interest felt aggrieved at the action of the Federal Power Commission in permitting the City of Tacoma to construct its tailrace across certain tidelands of Hood Canal and to erect transmission lines on a small portion of the tidelands of Hood Canal, then it should have appealed the order of the Federal Power Commission prior to 1924.

The appellant argues that the Skokomish Tribe of Indians, as a corporate entity, was not served with

process or notice of the hearings before the Federal Power Commission. We remind the court, however, that at that time the Tribe was not incorporated in the same manner as it exists today. We again remind the court that the Secretary of Interior and the Bureau of Indian Affairs were duly served with appropriate notices of the hearing, and, in fact, were given the plans and specifications for review and approval. This notice upon the Secretary of Interior through the Bureau of Indian Affairs constituted notice to the Skokomish people. We respectfully submit, therefore, that on this issue the appellant should not prevail, as this matter constitutes an impermissible collateral attack upon an order of the Federal Power Commission, and, under the rulings of the United States Supreme Court in many cases, one of the latest of which is *Tacoma v. Taxpayers*, 357 U.S. 320, 2 L. Ed. (2d) 1345, such an action may not now be maintained.

LACHES AND ESTOPPEL SHOULD APPLY

We respectfully submit that the common law doctrine of laches and estoppel should apply insofar as the appellee City of Tacoma is concerned as against the appellant in this action. While it is admitted that normally estoppel and laches do not apply against an Indian tribe or as against the United States of America, we feel that the circumstances in this case are so exaggerated that the court should consider the application of the doctrine. We would call to the court's attention the fact that the City of Tacoma in operating its municipally-owned utilities is not usurping lands

for a profit-making institution or for private purposes, but rather a municipality furnishing power to its citizens in accordance with the pronounced public policies of the United States of America and the State of Washington. The City at all times acted in good faith, as is disclosed by the evidence in the case. It made due application to the Federal Power Commission for the issuance of a license. It submitted to the Bureau of Indian Affairs all matters relating to its condemnation action for the acquisition against Indian allotments and Indians lands within the project, and received approval of its actions from the Bureau of Indian Affairs. (Ex. A-16, A-17; Tr. 694, 695.) It proceeded to erect and construct power facilities costing millions of dollars, which facilities have a present-day value greatly in excess of their original cost, estimated by the appellee City's witnesses to approximate $30 to $40 million. (Tr. 600, 601.) In addition to the direct value of the facilities, the residents, businesses, industries, and public institutions dependent upon these facilities for power have a value greatly in excess of the cost of the plants themselves.

It would appear unconscionable to now hold that the appellant, after said facilities have been in existence for from 30 to 40 years, is the owner of a portion of the facilities and in a position to render the use thereof null and void.

The evidence also discloses that members of the Tribe at the time the construction was undertaken were well aware of the construction and, indeed, tried to thwart the same. (Ex. A-23; Tr. 696.) In that

action, instituted by some of the Skokomish Indians against the City of Tacoma, no mention was made of the fact that the Indians at that time claimed the ownership to the tidelands in question.

The Supreme Court of the United States has concerned itself with the doctrine of laches insofar as Indians are concerned in some cases. In the case of *Felix v. Patrick*, 36 L.Ed. 719, the court held that laches applied and precluded the heirs of an Indian from reclaiming certain property allegedly fraudulently procured some 27 years before the suit was actually instituted. The court in that case considered the disproportionate value of the land, stating that as of the date the deed was made the land was worth approximately $150.00, and at the time the action was instituted was worth in excess of a million dollars. The court commented upon the disturbing of the security of titles that have existed for generations, and held that the Indian heirs could not recover. We respectfully submit, therefore, that this court should apply the doctrine of laches or estoppel in this particular case insofar as the appellee City of Tacoma is concerned.

CONCLUSION

The appellee City of Tacoma respectfully submits that the conclusions contained in the Brief of the appellee Hulda S. Carlson, found at pp. 31 through 33 thereof, should be sustained by this court. This appellee, City of Tacoma, further submits that the court should apply the doctrine of laches and estoppel to the claim of the appellant as against the appellee City of

Tacoma, and further, that the court should hold that the question sought to be raised here was before the Federal Power Commission some 35 or 40 years ago, and that the action of the appellant constitutes an impermissible collateral attack upon the order of the Federal Power Commission. This appellee earnestly suggests that the only logical outcome of this appeal is an affirmance by this court of the judgment of the lower court.

Respectfully submitted,

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No. 17,938

In the United States Court of Appeals for the Ninth Circuit

CASY O'BRIEN and DOROTHA O'BRIEN, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decisions of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 126-139) are reported at 36 T.C. 957.

JURISDICTION

The petition for review (R. 154) in this case involves federal income tax for the calendar years 1955, 1956, and 1957 in the amounts of $975.29, $1,083.62, and $1,149.26, respectively. (R. 6, 11, 19.) On July 29, 1958, the Commissioner of Internal Revenue mailed to the taxpayer notices of defi-

ciency for the taxable years 1955 and 1956. (R. 6-10, 11-14.) Within ninety days thereafter and on October 23, 1958, the taxpayer filed a petition with the Tax Court for a redetermination of these deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 1-14.) On January 12, 1960, the Commissioner mailed to the taxpayer a notice of deficiency for the taxable year 1957. (R. 19-21.) Within ninety days thereafter and on April 11, 1960, the taxpayer filed a petition with the Tax Court for a redetermination of the deficiency for the taxable year 1957 under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 16-21.) By order dated June 8, 1960, the two cases, Tax Court Docket Nos. 77,290 and 86,023, were consolidated. (R. 23.) The decisions of the Tax Court were entered on December 15, 1961. (R. 150, 151.) The cases are brought to this Court by a petition for review filed February 19, 1962. (R. 154.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

In computing his net operating loss for 1952 under Section 122(a) of the Internal Revenue Code of 1939, for carry-over purposes to the taxable years 1955 through 1957, may the taxpayer deduct a $33,451.67 judgment obtained against him in 1952 by four insurance companies when he did not pay any part of the judgment in 1952 and the judgment was based upon false and fraudulent statements he made in his insurance claim for a fire loss?

STATUTES INVOLVED

The statutes are set forth in the Appendix, *infra.*

STATEMENT

The facts, as stipulated (R. 25-29) and as found by the Tax Court (R. 126-133), may be stated as follows:

Casy O'Brien (hereinafter called taxpayer)[1] operated, as a sole proprietor, Casy's Feed and Seed Store in Redding, California. On July 17, 1949, a fire destroyed $27,853.23 worth of taxpayer's store's inventory and stock in trade. On or about August 3, 1949, taxpayer filed, with his four insurance companies, claims for the loss totalling $33,451.67—$5,598.44 more than the actual fire damage. (R. 126-127.) In order to support the $5,598.44 difference between the actual and claimed loss, taxpayer prepared and submitted to the insurance companies seven false and fraudulent scale tags or weight certificates purporting to show that taxpayer had purchased barley, wheat, and oats, as follows (R. 127):

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[1] Although joint returns were filed by taxpayer and his wife, for convenience this brief will refer to Mr. O'Brien as the sole taxpayer.

Tag or Certificate No.	Commodity	Amount of Claimed Purchase
8091	Wheat	$1,579.03
8183	Barley	908.56
8184	Barley	913.48
8185	Wheat	527.80
8186	Barley	859.57
8187	Wheat	378.00
8188	Oats	432.00
Total		$5,598.44

The insurance companies paid taxpayer the $33,-451.67 that he claimed due to him because of the fire loss; $30,106.51 was paid in 1949 and the remaining $3,345.16 was paid in 1950. (R. 127.) Subsequently, taxpayer's fraud was discovered and he was charged in a California criminal proceeding with violation of Section 556 of the Insurance Code of California, relating to the presentation of false and fraudulent claims of loss to insurers. (R. 128-129.) On June 11, 1951, taxpayer pleaded guilty to 11 violations of Section 556; taxpayer was then convicted and sentenced to prison for the statutory term. (R. 129; Stip. par. 8, R. 27-28.)

On July 5, 1951, the four insurance companies commenced suit against taxpayer for the $33,451.67 paid him. (R. 129.) The insurance companies' cause of action was based upon the following term contained in each insurance policy (R. 129)—

> This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof; or (b) in case

> of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This provision was alleged to be applicable by reason of taxpayer's presentation of the false and fraudulent certificates to the insurance companies. (R. 129.) On January 16, 1952, the California Superior Court granted the insurance companies' motion for summary judgment, stating in part (R. 130; see Ex. 5-E):

> Under Section 437c of the Code of Civil Procedure the motion for a summary judgment here must be granted, although there are some denials set forth in the answer, taking into consideration the affidavits on file with the documentary evidence consisting of the proceedings in People vs. Casy O'Brien in this same Court, it is plain that there is no meritorious defense to the complaint in this action.
>
> In fact, counsel for defendants practically concedes that as to the amount to which the various plaintiffs were defrauded by the defendant, the motion might be good and the main basis of argument is whether the plaintiffs can recover the full amount of their various insurance policy totals because of the facts alleged in the complaint; although it seems to be a harsh rule, apparently such is the case. The policies were voided by the action of the defendant for which he was adjudged guilty criminally on his own plea and said policies being voided and wiped out, the defendant's insurance companies were not obligated to pay one cent on any of them, and

> having made such payments before discovering the fraud to which they had been subjected, they are now entitled under their complaint in this action to recover the full amount thereof, if possible.

On January 28, 1952, judgment was entered for the insurance companies. The judgment was for the total amount prayed for — $33,451.67 — plus court costs of $18 and interest of 7% running from the dates of the payments to taxpayer. (R. 130.)

On January 30, 1953, taxpayer and the insurance companies agreed to the following compromise of the $33,451.67 judgment: Taxpayer was to pay $7,500, 4,500 down and 12 quarterly $250 payments beginning February 1, 1953; alternatively, taxpayer could pay $6,750 instead of $7,500 if the $6,750 was paid on or before February 1, 1954. Taxpayer paid the $4,-500 down but did not make any of the quarterly payments. In 1956, taxpayer paid $500 more to the insurance companies in consideration of the companies' release of a judgment lien against certain of taxpayer's properties that taxpayer wished to convey to third parties. In May, 1957, the statute of limitations was about to run out on the insurance companies' judgment; thereupon, the judgment was renewed. Subsequently, in 1958, the insurance companies entered a satisfaction of the judgment upon taxpayer's payment to them of $3,000. (R. 130-131.)

On taxpayer's income tax return for 1952, there was included in the amount deducted as "other busi-

ness expenses," on line 21 of Schedule C, $38,141.51 [2] which was described as "Judgment in Superior Court —Shasta County." In his tax returns filed for the succeeding years 1953 through 1957, taxpayer claimed net operating loss carry-over deductions, resulting in major part from the judgment claimed on taxpayer's 1952 return in respect of the judgment recovered against taxpayer by the insurance companies. The Commissioner, in his statutory notice of deficiency for 1955 (the first taxable year here involved), stated that the deduction of $38,141.51 claimed on the 1952 return was allowable only to the extent of $8,000. (R. 131-132.) The Commissioner explained (R. 132):

> The loss claimed in the taxable year 1952 in the amount of $38,141.51 from a judgment assessed by insurance companies on January 28, 1952, has been determined to be $8,000.00. It is held that the fair market value of the judgment be a total of the cash payments of $4,500.00, periodic payments aggregating $3,000.00 and an additional $500.00 paid in cash. Income has therefore been increased by $30,141.51.

The Commissioner claimed that no portion of the net operating loss remained unabsorbed at the beginning of the taxable year here involved; accordingly, the net operating loss carry-over deductions claimed for 1955, 1956, and 1957 were disallowed. (R. 132-133.)

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[2] The amount of $38,141.51 was apparently composed of (1) the $33,451.67 judgment, (2) interest of $4,681.84, and (3) court costs of $18. (R. 132.)

In the Tax Court proceeding, however, the Commissioner (departing from his position in the notice of deficiency that the judgment loss was deductible in 1952 to the extent of $8,000) argued that no loss at all was deductible for 1952. (R. 133.) The Tax Court agreed with the Commissioner's position as to the $33,451.67 judgment and $18 court costs, stating: "The allowance of such a deduction would frustrate the sharply defined public policy of California against making false claims of loss, by removing some of the "sting" from the consequence of petitioner's [taxpayer's] wrongdoing." (R. 137.) However, the Tax Court held the interest element—$4,681.84—deductible. (R. 139.) The Tax Court then concluded (R. 139):

> However, as we have found as a fact, the respondent in computing the amount of the deficiencies here involved allowed the petitioner a 1952 deduction for his claimed judgment loss in the amount of $8,000, which is in excess of the interest element of $4,681.84; and notwithstanding that respondent later changed his position, he has not sought to withdraw the benefit of such allowance. Thus, petitioner has already received a greater benefit than that to which he is entitled.

SUMMARY OF ARGUMENT

In 1949 and 1950 the taxpayer received insurance proceeds in the amount of $33,451.67, covering the fire damage to his feed and seed inventory and stock in trade. In 1952 it was discovered that he had pre-

sented false and fraudulent claims to the insurance companies; he was convicted for the crime and, in a civil proceeding filed against him by the insurance companies, the insurance policies were held to have been voided by his false and fraudulent representations and judgment was entered in favor of the insurance companies for the amount of the insurance proceeds they had previously paid him. Although he repaid none of the insurance proceeds in 1952 and never even subsequently paid more than $8,000, he claims a deduction in 1952 for the entire amount of the judgment on the ground that he was on the accrual basis and therefore entitled to deduct the insurance proceeds in the year his obligation to repay became evidenced by the judgment. On the basis of the resulting increase in his net operating loss in 1952, he claims carry-over deductions of that net operating loss to the taxable years 1955 through 1957.

1. The taxpayer is not entitled to the 1952 deduction he claims as a basis for carry-over deductions in the taxable years, and in that connection it is immaterial whether he was on the cash or accrual basis. The case involves money wrongfully received and to be taken into account in the years of receipt under the claim of right doctrine. He properly took the insurance proceeds into account in his 1949 and 1950 returns by not claiming a fire loss deduction. The proper year for offsetting deductions for the $33,451.67 is when the wrongfully received money is actually repaid. Since he made no repayment in 1952, he was not entitled to a deduction in any amount in that year. Moreover, he has been allowed

the benefit of his payment in subsequent years of a total of $8,000, since the Commissioner originally allowed him to deduct that amount in 1952. To allow him a greater deduction for 1952 (or any other year) would be to reward him for violating state law and thus, as the Tax Court held, frustrate state policy.

2. The $33,451.67 judgment is not deductible in computing the taxpayer's 1952 net operating loss for another reason. Under Section 122(a) and (d) the net operating loss is computed by excluding deductions which are allowed by law but not attributable to the trade or business (although such deductions may be applied against other income). The 1952 judgment was attributable to false and fraudulent statements made by the taxpayer in his insurance claim, rather than to the fire connected with his business, and the judgment therefore was not attributable to his trade or business.

ARGUMENT

The Tax Court Correctly Held That the Taxpayer Is Not Entitled To a Deduction In 1952 In Excess of $8,000 By Virtue of the Judgment Rendered Against Him In That Year and That He Therefore Had No Net Operating Loss In 1952 Under Section 122(a) of the Internal Revenue Code of 1939 To Carry Over To and Deduct In the Taxable Years 1955 Through 1957

A. *The 1952 judgment is not deductible because it was not paid in 1952*

In 1949 and 1950 the taxpayer received a total of $33,451.67 from insurance companies on his claims for a loss due to a fire which destroyed the inventory and stock in trade of his feed and seed store. In

those years he had no loss from fire and did not claim one, since the loss was fully compensated for by insurance and therefore not deductible. (Section 23(e) of the Internal Revenue Code of 1939, Appendix, *infra.*) Two years later he was charged and convicted in a criminal proceeding relating to presentation of false and fraudulent claims of loss and, in a civil proceeding instituted by the insurance companies, the insurance policies were held to have been voided by the taxpayer's fraud and judgment was entered in favor of the insurance companies for the $33,-451.67, which they had previously paid the taxpayer as insurance proceeds. The taxpayer did not pay any part of the judgment in 1952. On January 30, 1953, prior to the filing of his 1952 return, he entered into a compromise agreement with the insurance companies under which he was to pay a total of $7,500, or $6,750, by January 1, 1954, in place of the $33,-451.67 amount of the judgment. As it turned out, a total of $8,000 was paid by or on his behalf in years subsequent to 1952, and in 1958 the insurance companies entered a satisfaction of the judgment. Thus, the taxpayer retained $25,451.67 of the amount paid to him as insurance proceeds.

Nevertheless, the taxpayer has contended that the entire $33,451.67 (plus an additional amount apparently composed of $4,681.34 in interest on the judgment sum and $18 in court costs, and thus a total of $38,141.51) was deductible in 1952 as a business expense or loss; that the deduction of that amount resulted in a net operating loss in 1952;

and that the net operating loss may be carried forward and deducted in the taxable years 1955 through 1957. The Commissioner allowed the taxpayer a deduction of $8,000 in 1952 and, as a result of this and other adjustments not in issue, determined that no portion of the taxpayer's 1952 net operating loss remained unabsorbed at the beginning of the first taxable year (1955). Accordingly, while the issue is as to the propriety of claimed net operating loss carryover deductions in 1955 through 1957, the answer thereto depends upon the amount of the taxpayer's net operating loss in 1952, which, in the Tax Court, in turn depended upon whether he was in that year entitled to a deduction in excess of $8,000 because of the judgment entered against him in that year in favor of the insurance companies.

The Tax Court held that no part of the $33,451.67 judgment or $18 in court costs were deductible by the taxpayer in 1952. However, noting that the taxpayer was apparently claiming a deduction in 1952 for $4,681.84 representing interest on the principal sum, the Tax Court held that this amount was deductible but that, since the Commissioner had allowed an $8,000 deduction in 1952, the taxpayer had already received a greater benefit than that to which he is entitled. (R. 139.) In the Rule 50 computation the $8,000 deduction was reduced to $4,681.84 (see R. 144), but this of course did not change the fact that the taxpayer's net operating loss for 1952 was offset against income in 1953 and 1954 and that there therefore was no 1952 net operating loss to carryover to

and deduct in the taxable years 1955 through 1957.[4] Nor did it change the fact that for the closed year 1953 and 1954 effect had been given to the $8,000 deduction allowed by the Commissioner for 1952.

The holding of the Tax Court (where the taxpayer was represented by counsel) that the $33,451.67 judgment was not deductible in 1952 was based on the ground that allowance of the claimed deduction "would frustrate the sharply defined public policy of California * * * by removing some of the 'sting' from the consequences of petitioner's [taxpayers'] wrongdoing." (R. 137.) We believe that frustration of state policy is a proper basis for denying the taxpayer's claim (cf., *Tank Truck Rentals* v. *Commissioner*, 350 U.S. 30; *Hoover Express Co.* v. *United States*, 356 U.S. 38) but for a more precise reason, i.e., the taxpayer had no loss in 1952, no loss in any succeeding year in excess of $8,000, and therefore to allow him a deduction in 1952 for the entire $33,451.67 would be to *reward* him for having violated state law. The 1952 judgment and the resulting obligation on the part of the taxpayer to make restitution of the insurance proceeds did not of itself frustrate state policy, but to allow the deduction he claimed on the basis of that judgment would. In brief, the correctness of the Tax Court's basis for

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[4] With an $8,000 deduction in 1952 and a carry-over of that amount to 1953 and 1954, the deduction offset all of the taxpayer's income in 1953 and all but $34.42 of his 1954 income of $6,098.47. With a $4,681.84 deduction in 1952 and a carry-over of that amount of 1953 and 1954, the deduction offset all of the taxpayer's income in 1953 and offset $2,745.89 of his 1954 income of $6,098.47. (See R. 148.)

decision turns upon whether the taxpayer had a loss in 1952 in excess of $8,000 (an amount which would all be absorbed prior to the taxable years). The answer requires consideration of fundamental precepts in the light of the facts of the case, is plainly in the negative, and thus provides incontrovertible support for the Tax Court's decision even independently of the frustration of state policy which results if the taxpayer is allowed the claimed deduction.[5]

It is apparent, as the Tax Court stated (R. 135), that the taxpayer had no loss in 1952 from the fire which destroyed his inventory and stock in trade. In the first place, since he had presented false and fraudulent scale tags and weight certificates purporting to show purchases of grain totalling a claimed $5,598.44 (see R. 127) and the insurance companies had paid him a total of $33,345.67, including the amount of the fraudulent claims, only the difference, or $27,747.23, could represent a loss traceable to the

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[5] In his 1952 income tax return the taxpayer claimed a deduction of $38,141.51 under "other business expenses" (R. 131-132), but in the Tax Court argued only for deduction of a "judgment loss" (R. 133). The amount of the judgment (plus interest and court costs) plainly was not deductible under Code Section 23(a)(1)(A) (Appendix, *infra*) as being an ordinary and necessary expense incurred by the taxpayer in carrying on his trade or business. The judgment liability was not a *business* expense, because it had its origin not in the fire loss but in the taxpayer's fraudulent action which nullified the insurance policies covering the fire loss and, for the same reason, was neither an "ordinary" nor "necessary" expense incurred in the taxpayer's business. Cf. *United States* v. *Gilmore,* 372 U.S. 39.

fire. Secondly, that loss was fully compensated for by the insurance companies' payment to the taxpayer of the $33,345.67 in 1949 and 1950 and, if he later sustained a loss, it was not because of the fire but because he had made false and fraudulent statements to the insurance companies in his fire loss claim. In 1952 those fraudulent statements were held to render the insurance policies void. This meant that the fire was not covered by insurance and that the taxpayer had received $33,345.67 to which he was not entitled. But the judgment in favor of the insurance companies merely entitled them to collect the $33,345.67 from the taxpayer if they could; it did not give them back their $33,345.67. And, until the taxpayer disgorged the $33,345.67, he had no loss either from the fire or from making fraudulent statements to the insurance companies. Only the potential for a deduction in the amount of $33,345.67 (or a larger sum, including interest) existed—the possibility that he would pay the judgment in that amount, which would cancel out his prior receipt of the $33,345.67.

The taxpayer's argument in the Tax Court, and apparently also in this Court (see Br. 6-7), was that he was on the accrual basis of reporting his income and that the judgment, representing an obligation to repay the insurance companies, established his loss. The Tax Court made no finding as to whether he was on the cash or accrual basis.

If he was on the cash basis, his claim to a deduction in 1952 requires little discussion. It is axiomatic that a cash basis taxpayer has no right to a

deduction in the absence of actual payment of the item for which a deduction is claimed; it is not enough that an obligation to pay may have arisen. The taxpayer made no payment in 1952 on the judgment and therefore had no loss in 1952 as a result of the judgment (although the Commissioner allowed him an $8,000 deduction in 1952). As a cash basis taxpayer, the taxpayer would be entitled to deductions in the subsequent years for amounts paid on the judgment, but he has not claimed such deductions and they would not help him for the taxable years 1955 through 1957. He paid $4,500 on the judgment in 1953, but that amount would be cancelled out by deduction against 1953 and 1954 income.[6] He paid $500 in 1956, one of the taxable years, but that amount, according to the Tax Court's finding (R. 131), was paid "in consideration for their [the insurance companies'] release of the judgment lien for certain property which petitioner and his wife desired to sell to third parties" and was therefore really a capital investment rather than a deductible item. The final $3,000 was paid in 1958, which is after the taxable years involved here.

The same result obtains for the taxable years, although for a different reason, if the taxpayer was on

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[6] In 1952 the taxpayer had a business loss of $2,513.91 over and above any loss from the judgment. If his $4,500 payment in 1953 is deducted in that year, when he otherwise had income of $1,772.10, he had a total loss of $5,241.81 in 1952 and 1953 and this would be offset against his 1954 income of $6,098.47. Thus, the $4,500 deduction in 1953 would be absorbed before the taxable years.

the accrual basis. This is not a case involving the accrual of income and deductions on the basis of the mere right to receive income and the obligation to pay expenses, respectively. Nor does the case involve a question as to when the taxpayer is entitled to a deduction for a fire loss. The taxpayer was compensated for the fire loss in 1949 and 1950 and that transaction is closed. The only question is whether and when the taxpayer is entitled to a deduction because of his obligation, evidenced by the judgment rendered against him in 1952, to repay the insurance proceeds to the insurance companies. In other words, the question is not as to when a loss accrued (for the taxpayer had no loss as such), but as to when a deduction may be taken because of an obligation to repay money which the taxpayer actually received but was not entitled to receive.

The answer lies in what may, for present purposes, be called an exception as to accrual basis taxpayers, i.e., the time when a deduction is proper for money which has been taken into account for tax purposes under the claim of right doctrine "now deeply rooted in the federal tax system" (*United States* v. *Lewis*, 340 U.S. 590, 592). That doctrine, as first stated in *North American Oil* v. *Burnet*, 286 U.S. 417, 424, is that "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." The doctrine has been applied by the Supreme

Court to the net profits received from oil land while title to the land was still in dispute (*North American Oil* v. *Burnet*, *supra*), to a bonus which had been improperly computed (*United States* v. *Lewis*, *supra*), to excessive compensation leading to transferee liability (*Healy* v. *Commissioner*, 345 U.S. 278), and to amounts received illegally through embezzlement (*James* v. *United States*, 366 U.S. 213). The doctrine is not limited to money constituting earnings, as distinguished from money whose receipt compensates for a loss and therefore precludes the taking of a loss deduction. As stated in *Healy* v. *Commissioner*, *supra*, p. 282, "There is a claim of right when *funds* are received and treated by a taxpayer as belonging to him. The fact that subsequently the claim is found to be invalid by a court does not change the fact that the claim did exist" (italics supplied). And in *James* the funds involved consisted of embezzled funds, which obviously were not earnings as to the embezzler. In the present case, as in *James* (p. 216), the taxpayer "obtained the money by means of a criminal act * * *" and the important fact "is that the right to recoupment exists" (p. 217). The present taxpayer therefore correctly took the insurance proceeds into account in reporting his income in 1949 and 1950, when he received the insurance proceeds.

But, consistently with the rationale of the claim of right doctrine that the money wrongfully or mistakenly received is to be taken into account for tax purposes in the year of receipt, the taxpayer is entitled to a deduction in respect of the insurance proceeds only when they are actually repaid, not when the

obligation to repay accrued. As a matter of fact, the obligation to repay, on which the taxpayer has based his accrual argument, arose not in 1952, when the judgment against him was entered, but at the time he fraudulently received the insurance proceeds. The only reason he may be entitled to a deduction at all (irrespective of the proper year or years) is that he properly took the insurance proceeds into consideration in his 1949 and 1950 tax returns, as covering what, but for the compensating insurance proceeds, would have been a fire loss. For tax purposes, he is entitled to offset his receipt of the insurance proceeds if there is a basis for doing so. But the fact that in 1952 his fraud was discovered and reduced to a judgment requiring repayment of the amount of the insurance proceeds had no affect upon his income situation for that year. He still had the money. Until he disgorged it, he could not properly claim a deduction of any kind. He could only claim a deduction based upon a reduction in his income and there could be no such reduction in his income until he actually repaid the insurance proceeds. Accordingly, in 1952 there was nothing to support a deduction. As stated in the *James* case (p. 220):

> Just as the honest taxpayer may deduct an amount repaid in *the year in which the repayment is made*, the Government points out that, "*if, when, and to the extent that the victim recovers back the misappropriated funds*, there is of course a reduction in the embezzler's income." (Italics supplied.)

See also, *North American Oil* v. *Burnet*, *supra*, p. 424; *Healy* v. *Commissioner*, *supra*, p. 284.

The reason a taxpayer on the accrual basis is normally entitled to deductions in the year his obligation to pay accrues is that his income is also reported on a similar basis, i.e., when the right to receive accrues. It is assumed both that the income will be received and that the obligations will be paid. No such assumption can be made in relation to funds wrongfully or mistakenly received. First, there would be a contradiction in principle if the reporting of the income were required, as it is, merely because of its actual receipt under a claim of right, and if a deduction were then allowed for the same funds on some basis other than their actual restitution. Secondly, it is totally unrealistic, as a practical matter, to assume that wrongfully or mistakenly obtained funds will be repaid merely because the obligation of repayment exists. To allow a deduction although the funds have not been repaid and may never be repaid is to reward the taxpayer for his wrongful act. The tax laws permit no such anomalous result.

B. *The 1952 judgment is not deductible because it was not attributable to the taxpayer's trade or business*

Code Section 122(a) (Appendix, *infra*) defines the term "net operating loss" as meaning "the excess of the deductions allowed by this chapter over the gross income, with the exceptions * * * provided in subsection (d)." Subsection (d) states that "Deductions otherwise allowed by law not attributable to

the operation of a trade or business regularly carried on by the taxpayer shall * * * be allowed only to the extent of the amount of the gross income not derived from such trade or business." It does not appear that the taxpayer had any income in 1952 which would be classified as nonbusiness income. Accordingly, the 1952 judgment provides no basis for a deduction in computing his net operating in 1952 if the judgment was "not attributable" to his trade or business.

We recognize that the judgment had a relation to his business in the sense that, if the fire had not occurred, he would never have filed false and fraudulent insurance claims and there would never have been any judgment against him. But the real reason for the judgment was not the fire. He was fully compensated for that. The judgment was occasioned solely be the false and fraudulent claims he made to the insurance companies, and these were no part of his business. We therefore believe that, for this additional reason, the taxpayer is not entitled to the deduction he claims in 1952.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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May, 1963

CERTIFICATE

It is hereby certified that counsel for the respondent has examined the provisions of Rules 18 and 19 of this Court and that in his opinion the foregoing brief conforms to all requirements.

Dated:.....day of....., 1963.

Attorney

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *.

* * * *

(b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness, * * *.

* * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. No loss shall be allowed as a deduction under this paragraph if at the

time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 122 [as added by Sec. 211(b), Revenue Act of 1939, c. 247, 53 Stat. 862]. NET OPERATING LOSS DEDUCTION.

(a) [as amended by Sec. 105(e)(3)(A), Revenue Act of 1942, *supra*] *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [as amended by Sec. 215(a), Revenue Act of 1950, c. 994, 64 Stat. 906] *Amount of Carry-Back and Carry-Over.*—

(1) *Net operating loss carry-back.*—

* * * *

(B) *Loss for Taxable Year Beginning After 1949.*—If for any taxable year beginning after December 31, 1949, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for the preceding taxable year.

(2) *Net operating loss carry-over.*—

* * * *

(B) *Loss for Taxable Year Beginning After 1949.*—If for any taxable year beginning after December 31, 1949, the taxpayer has a net operating

loss, such net operating loss shall be a net operating loss carry-over for each of the five succeeding taxable years, except that the carry-over in the case of each such succeeding taxable year (other than the first succeeding taxable year) shall be the excess, if any, of the amount of such net operating loss over the sum of the net income for each of the intervening years computed—

(c) [as amended by Sec. 105(e)(3)(B) and Sec. 153(b), Revenue Act of 1942, *supra*, and Sec. 121(g)(2), Revenue Act of 1950, *supra*] *Amount of Net Operating Loss Deduction.*—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26(h)(i)).

(d) *Exceptions, Additions, and Limitations.*—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * * *

(5) [as amended by Sec. 344(a), Revenue Act of 1951, c. 521, 65 Stat. 452] Deductions otherwise allowed by law not attribu-

table to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions, additions, and limitation specified in paragraphs (1) to (4) of this subsection. This paragraph shall not apply with respect to deductions allowable for losses sustained after December 31, 1950, in respect of property, if the losses arise from fire, storm, shipwreck, or other casualty, or from theft.

* * * *

(26 U.S.C. 1952 ed., Sec. 122.)

Insurance Code, 42 West's Annotated California Codes:

Sec. 556. *False or fraudulent claim; penalty.* It is unlawful to:

(a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.

(b) Prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim.

Every person who violates any provision of this section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both.

Penal Code, 47 West's Annotated California Codes:

Sec. 16. *Crimes; kinds*

CRIMES, HOW DEFINED. Crimes are divided into:

1. Felonies; and
2. Misdemeanors.

Sec. 17. *Felonies and misdemeanors defined; offense punishable as either felony or misdemeanor; commitment to youth authority*

A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison. * * *

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No. 17941

In the

United States Court of Appeals

For the Ninth Circuit

REYNOLDS METALS COMPANY, a corporation, and HENRY W. SHOEMAKER,
Appellants and Cross Appellees,

vs.

JULIUS LAMPERT and EVELYN LAMPERT,
Appellees and Cross Appellants.

Appellees' Reply to Petition for Rehearing

Appeal from the final judgment of the United States District Court for the District of Oregon

THE HONORABLE GUS J. SOLOMON, Judge

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Reply to Petition for Rehearing

Pursuant to a request of the Court, appellees submit hi reply to appellants' petition for a rehearing of appellees' cross-appeal on the issue of punitive damages.

ARGUMENT

I

This Court correctly ascertained the law of Oregon pertaining to punitive damages.

1. This Court correctly ascertained the law of Oregon relating to punitive damages. *Fisher v. Carlin*, 219 Or 159, 346 P2d 641 (1959), emphasizes that malice or bad motive are not the only aggravating circumstances which justify an award of such damages; wanton disregard of social obligations is another such circumstance. *Hall v. Work*, 223 Or 347, 354 P2d 837, 366 Or 533 (1960) states the same rule.

> "The cases consistently hold that punitive damages may be allowed where there is evidence of malice *or willful, wanton disregard of the property rights of plaintiff or other aggravating circumstances*." (Emphasis supplied) *Hall v. Work*, 223 Or 347, 363, 354 P2d 837, 844, 366 P2d 533 (1960).

Appellants ignore both *Fisher v. Carlin*, *supra*, and *Hall v. Work*, *supra*.

2. Appellants have not produced a single decisio from Oregon or elsewhere denying punitive damge on the ground that a defendant committed a tresas while using his property in an otherwise lawful ran ner. (Appellants cite an unreported decision of a ria court, but the plaintif therein introduced no evidnc to support his claim for punitive damages and didnc press the claim at trial. There was no holding in na case denying punitive damages as a matter of law.

3. Appellants quote language from the opinio i *Perez v. Central National Insurance Co.*, 215 Or 0 332 P2d 1066 (1958), but in a manner which is mis leading for one is left with the impression that the re gon courts will allow punitive damages only in cse whose facts closely resemble the facts in cases whei such damages have been previously allowed. In *Pe* the Court merely refused to expand the list of aggraat ing circumstances previously held to justify puniv damages. A plaintiff must still demonstrate the exst ence of one or more of the circumstances enumerae in *Fisher v. Carlin*, *supra*.

4. The argument appellants base upon the caso *Cays v. McDaniel*, 204 Or 449, 283 P2d 658 (195 assumes that the opinion of this Court authorizes h recovery of punitive damages in any case involvinga intentional trespass. Appellees have never contend

ad this Court manifestly did not hold, that the mere intentional emission of fluorides into the atmosphere ould justify, without more, an award of punitive damages. This Court held that the record contained *additional* evidence from which the jury could have found e existence of aggravating circumstances.

II.

This Court's application of Oregon law was correct.

1. The opinion of this Court emphasizes the fact at for a period of years appellants have known that uorides from their plant settle on appellees' property d damage appellees' crops. (See Tr 162-64, 173-74.) ne record, moreover, is replete with additional evinence justifying the Court's decision.

(a) From the testimony of Paul Martin (Tr 9, 10) e jury could have found that appellants failed to imove their fluoride controls because "it is cheaper to ay the claims than it is to control fluorides."

(b) Appellees have had to bring successive actions recover damage occasioned by appellants' repeated espasses for each year since 1947.

(c) From the testimony of Sigmund Schwarz (Tr 45-59) the jury could have found that superior methods fluoride control have been, and are, available to ppellants and if installed would remove practically ll fluorides.

(d) Despite their knowledge of the damaging ef-
fects of fluoride emission, appellants in 1957 nea
doubled the output of fluorides into the air. (Tr 164-6)

2. Appellants ask this Court to consider a rec
New Jersey decision (*Berg v. Reaction Motors Div.*,
NJ 396, 181 A2d 487 (1962)) which is clearly dist
guishable on its facts. None of the aggravating circu
stances listed above were present in *Berg*. Defendant
that case had actively cooperated with the plaintiffs
an attempt to develop a program for minimizing
likelihood of property damage, and had substantia
carried out the plan agreed upon.

In the instant case appellants' only attempt to
duce fluoride emission was their installation in 19
of a water scrubbing system. But a substantial portio
of the harm appellees and others have suffered h
occurred since that time, and appellants' use of t
stations does nothing to alleviate the problem. As t
Court pointed out in the unpublished opinion in *Rey-
olds Metals Co. v. Yturbide*, No. 14990 (9th Cir, Ap
24, 1957), the maintenance of testing stations indica
knowledge of a serious toxic condition. And in vie
of appellants' intention to pay claims rather than co
trol fluorides, it may well be inferred that the testi
stations were maintained for purposes connected wi
litigation rather than fluoride control.

It has become evident that compensation alone w
not deter appellants; an award of punitive damages
amply justified. See *Kingsley v. United Railways C*

60 Or 50, 133 Pac 785 (1913) and Morris, *Punitive Damages in Tort Cases*, 44 Harv L Rev 1173 (1931).

3. The motions for leave to submit briefs *amici curiae* assert that there is no way to prevent the emission of effluents into the atmosphere and that the decision of this Court will render manufacturers potentially liable for punitive damages where some particulate matter escapes, though in harmless quantities. The assertion reveals a careless reading of the opinion in this case and is wholly without support in the record. Punitive damages are in no case recoverable absent proof of actual damage. Movants choose to ignore the opinion and record, and in the guise of *amici curiae*, seek to retry appellants' case in this Court.

Respectfully submitted,
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GEORGE L. KIRKLIN
Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this reply, I have examined Rules 18, 19 and 23 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply to petition for rehearing is in full compliance with those rules.

HERBERT ANDERSON
Attorney

No. 17954

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

SHERWOOD & ROBERTS - KENNEWICK, INC., a Washington Corporation, Appellant

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Minnesota Corporation Appellee.

Appeal from the United States District Court for the Eastern District of Washington Southern Division

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT of APPEALS

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ST. PAUL'S COUNTER-STATEMENT OF THE CASE

In our opening brief we set forth objectively the facts relating to the issues presented on this appeal and supported them with detailed references to the transcript of evidence and to the exhibits.

Appellee's counter-statement set forth the evidence most favorable to appellee (Appellee's Brief, p. 2). Summarized, this "favorable evidence" is excusatory, not exculpatory.

For every action there was an excuse, not a denial. There is no excuse for dishonesty.

We will not make a detailed restatement of the facts and will comment only briefly on appellee's restatement.

Appellee claims that S&R had knowledge of Chamberlin's actions because a monthly Finance Loan Register was submitted by him to S&R—Walla Walla. The fact is the Finance Loan Register is an accounting document which is fed into an I.B.M. machine to show the total volume of business, earned discounts, reserves, etc. A loan appears on the Finance Loan Register only once—the month in which the loan is made. Thereafter it does not reappear (Tr. 1665). Delinquent loans are not reported on the Finance Loan Register. It would be impossible to determine delinquencies, financial stability or loan status from the Finance Loan Register. (Def. Exs. A-10, A-31).

Appellee apparently contends that the sheer volume of business done by S&R with Walker excuses all Chamberlin's conduct in respect to the Walker accounts (Appellee's Brief, pp. 3 & 4).

Based on figures set forth by appellee, the total interest charged and received by S&R on loans made to Walker and his companies during the period 1953 to 1959 was only slightly more than 2% (Appellee's Brief, p. 3).

Appellee relies heavily upon the contention that Walla Walla failed to make sufficient funds available to Chamberlin to allow him to take care of business in the Tri-City area. Shortage of funds necessary to correct book overdrafts was given as the excuse for the Chamberlin - Walker check kiting. On October 10, 1958, as it had before, S&R advised Chamberlin:

> ". . . If you need additional funds to overcome book overdrafts, please advise me and the funds will be advanced accordingly. . . ." (Plfs. Ex. 84 at p. A-1, Appendix).

Other points raised by appellee will be dealt with in our argument.

ARGUMENT

ERRORS 1, 2, 3, 4, AND 5

A. THE ISSUE OF DISHONESTY WAS ELIMINATED FROM THE CASE.

The Eighth Circuit Court of Appeals characterized an employee's conduct as dishonest within the meaning of a fidelity bond as follows:

> "The test is not whether he intended to personally profit by his course, though that he did is perhaps a permissible inference from the facts shown. He occupied a position of trust and confidence which he secretly betrayed. He received compensation for guarding the interests of his employer and he was wilfully, intentionally and grossly faithless." *United*

States Fidelity and Guaranty Co. v. Egg Shippers S & F Co., 148 F. 353, 355.

Justice Cardozo held that dishonesty within the meaning of an indemnity contract:

> "may be something short of criminality . . . the measure of its meaning is not a standard of perfection, but an infirmity of purpose so opprobrious or furtive as to be fairly characterized as dishonest in the common speech of man . . . "
>
> *World Exchange Bank v. Commercial Casualty Ins. Co.,* 255 N.Y. 1; 173 N.E. 902, 903. Appellee's Brief, p. 47.

Compare the definition of fraud set out at Page 61 of appellee's brief:

> "It (fraud) consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him injury . . . " *Brown v. Underwriters at Lloyds,* 53 Wn. (2d) 142; 332 P. (2d) 228.

The Trial Court compelled a finding of fraud as a condition precedent to liability when he instructed:

> "Therefore, if you find that fraud or dishonesty, or both, *including intent to defraud the plaintiff* have been proved to your satisfaction . . . the plaintiff has sustained its burden of proof . . . " (emphasis supplied)

and:

> "However, if you find that neither fraud nor dishonesty, *including intent to defraud the plaintiff* have been proved to your satisfaction . . . the plaintiff has not sustained its burden of proof . . . ." (Tr. 2300-2301; emphasis supplied.)

Fraud may embrace dishonesty but dishonesty does not embrace fraud.

The Court's requirement of "intent to defraud" squares with the definition of fraud in Brown v. Underwriters at Lloyds, but does not conform to any definition of dishonesty as applied to a fidelity bond that we have been able to find. The Court's requirement that the jury find "intent to defraud" prevented the plaintiff from getting a hearing on the issue of dishonesty. St. Paul specifically insured against dishonesty. Insurance against dishonesty represented part of the consideration for the contract. With this eliminated, appellant was deprived of the consideration for which it paid its premiums (Pl. Ex. 1).

At the least Chamberlin's dishonesty was evidenced by a want of integrity and breaches of trust. His acts involved consciously wrongful conduct involving moral turpitude. The bond was written to idemnify S&R against losses resulting from the commission of consciously wrongful conduct of a nature which is wilfully, intentionally, and grossly faithless. 45 C.J.S. Insurance, Sec. 802, p. 852; *United States Fidelity & Guaranty Co. v. Egg Shippers S & F. Co.,* 148 F. 353, 355; *Foster v. Bowen,* 311 Mass. 359; 41 N.E. (2d) 181.

B. THE CHAMBERLIN-WALKER DEALS: A HISTORY OF DECEIT

Check Kiting

The history of the Chamberlin-Walker deals is one of calculated deception and deceit. Each concealment and misrepresentation of a material fact by Chamberlin from his employer created the necessity for still another deception. To remain buried, every past act of deceit required the perpetration of another act of

deceit. Like a pebble thrown into still water, the initial splash created an ever-widening circle of disturbance.

The initial deceptions took place between December 26, 1957 and September 24, 1958, when Chamberlin and Walker kited checks between WalkerMotors and S&R totalling $157,580.00 (Tr. 1382-1387, 1402-1404). The check kitings were more than acts of deceit. Neither Walker Motors nor S&R had sufficient funds in the bank to meet the checks in full upon presentation (Tr. 991-993, 1402-1404). Precise timing was required to prevent the checks from bouncing. R.C.W. 9.54.050 provides that any person who makes, draws, utters or delivers a check on a bank knowing that there are insufficient funds on deposit to meet the check shall be guilty of larceny.

Appellee states that the checks were kited to eliminate an overdraft on the books of S&R—Kennewick (Appellee's Brief, p. 11). The actual and intended effect was to conceal from the home office the overdraft which existed at month's end. In point of fact, the bank account itself was frequently overdrawn. See Ex. 84, p. A-1, Appendix.

Chamberlin had been warned repeatedly of overdrafts and was told that inter-company borrowings between Fairway—Kennewick and S&R—Kennewick would not be tolerated. *The home office was ignorant of the Walker-Chamberlin check kiting.* Edwards' memo (Pl. Ex. 84) on the subject is set out in the Appendix, p. A-1.

Seeking to excuse Chamberlin's conduct, appellee

implies on pages 10-12 of its brief that S&R condoned the check kiting. Not one reference is cited by appellee which even faintly gives rise to this implication. Appellee quotes out of context from Chamberlin's testimony to the effect that:

> ". . . if the book overdraft resulted in a bank overdraft, that I would be, in his terms [Donald Sherwood's], and I quote 'standing alone'."[1]

Of course, the statement was not rebutted because it is quite true. The quoted statement most certainly does not relate to the Walker-Chamberlin check kiting. Appellee's implication that S&R approved of the Walker-Chamberlin check kiting, or even knew about it, is false.

Chamberlin, in trouble because of repeated overdrafts, sought to hide the matter by check kiting. But what caused Chamberlin to get into the overdraft situation? Substantial contributing factors were the Walker and Williams delinquencies which arose in large part from cars sold out of trust, NSF checks, and employee car deals (Tr. 241, 247, 523, 608, 707-710, 745, 760-765, 768, 769, 861, 862, 876, 2005, 2101).

November Loans Conceal Check Kiting And Out of Trust

Edwards expected accounts to be paid out of receivables (Pl. Ex. 84). Of course, neither Williams nor Walker could pay, thus creating an overdraft situation. Checks could not be kited indefinitely nor could

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[1] The full testimony from which this quotation is extracted is set out in the Appendix at pp. A-4 to A-7.

the Walker and Williams accounts be forever eliminated from the delinquency reports (Tr. 892). These facts gave rise to the necessity of the next act of deceit.

On November 19, 1958, Walker was out of trust $32,590.15 and was delinquent on capital loans totalling $52,114.49. At the same time the Williams obligations of $16,328.91, including NSF checks of $7,125.29, were delinquent. These mounting delinquencies, which had been concealed from Walla Walla, threw Chamberlin's cash account far out of balance as no money was being collected on these receivables. Consolidation of the Walker and Chamberlin loans provided Chamberlin with a device to conceal his earlier deceits and at the same time enabled him to hide the true status of these accounts. (R. 21, 22; Tr. 609-611, 2002, 2011, 2093-2094; Pl. Ex. 62; Appellant's Brief, A-19.) As a result of the consolidation loans made November 19 and 20, 1958, Chamberlin was able to put these accounts on a "current" basis. More importantly, the "NSF" and "out-of trust" situation could be hidden by dutifully reporting the loans on the Finance Loan Register (Def. Ex. A-10). By making these loans Chamberlin corrected his overdraft situation and successfully continued to hide out-of-trust transactions, NSF, check kiting and the desperate financial condition of Walker and Williams. Within a space of two days, Chamberlin had put obligations totalling $68,443.40 on a "current" basis, corrected his overdraft situation, and eliminated the necessity of putting the Walker and Williams obligations on the delinquency list.

The Finance Loan Register (Def. Ex. A-10) did not set out the background of any loan nor give any in-

formation on the financial stability of the borrower. In fact, the Finance Loan Register was a most useful tool for Chamberlin. It will be recalled that Chamberlin had wide authority (Appellee's Brief, p. 8). He was a fiduciary in the broadest sense. His employer relied, as it had a right to, on his honesty as a fiduciary. The reports required of Chamberlin were needed for accounting purposes. Chamberlin was free to use his best business judgment in making loans—he was not free to deceive, to lie, to conceal, to misrepresent.

Misrepresentation And Concealment of Material Facts – Fiduciary Responsibility Violated

In a leading case, Justice Cardozo said:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd." *Meinhard v. Salmon,* 249 N.Y. 458, 464; 164 N.E. 545, 546 (1928); *Leppaluoto v. A. W. Larson Const. Co.,* 57 Wn. (2d) 393, 403; 357 P. (2d) 725; R.C.W. 23.01.360[2]

In the face of these facts Chamberlin loaned an additional $15,000 to Walker on his personal note to al-

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[2] See Feuer, Personal Liabilities of Corporate Officers and Directors, Chapter 5, 6 & 8 Conflict-Producing Transactions, Prentice-Hall 1961.

low Walker (according to Chamberlin) to buy parts and advertising from American Motors (Appellee's Brief, p. 52). Dion says the purpose of the loan was to enable Walker to show cash in the Rambler bank account (Tr. 783-784.)

At this point Chamberlin, having committed S&R to a $100,000 line of credit to finance the purchase of Ramblers, had to obtain authority from Donald Sherwood for S&R to guarantee the credit line. Chamberlin's testimony relative to his conference with Donald Sherwood on the guarantee is revealing, though evasive (Tr. 2113, 2114). This testimony is set out in the Appendix hereto pages A-3, A-4.

The testimony of Chamberlin and Sherwood is in conflict as to whether the November 30, 1958 financial statement of Rambler was shown to Sherwood. However, Sherwood and Chamberlin discussed the kind of dealer Walker was and Walker's financial stability (Tr. 2113, 2114). The fact that Walker had been seriously out of trust, was without funds to pay delinquencies, and even needed cash to make minimal purchases from Rambler was not revealed to Sherwood.

Chamberlin did represent to Sherwood that he had personally handled Mr. Walker's account for seven years and that "Mr. Walker's business practices have been beyond reproach" by showing him his letter to American Motors (Pl. Ex. 68).

A fiduciary must give to the corporation all the relevant and material information he possesses and can obtain on the subject of a transaction. *Cumberland Coal & Iron Co. v. Sherman,* 30 Barb. 553 (N.Y. Sup.

Ct. 1859) But appellee states at page 52 of its brief "further facts could have been had by Walla Walla for the asking."

The actions of Chamberlin conclusively demonstrate and exhibit deceit and dishonesty, not mere negligence or poor business judgment as appellee contends.

Chamberlin Takes Stock From Defaulting Borrower

On July 17, 1958, Chamberlin acquired stock in Tri-City Rambler. Whatever the reason, it is undisputed that Chamberlin did not divulge his stock interest and in fact denied it until confronted with the evidence (Tr. 1144, 1167, 1168, 1169, 1355). If, as he claims, he had no present interest in the stock and in fact didn't want it, why did he first hide and later deny his ownership?

> "... the taking of a private profit violates the [fiduciary] principle of undivided loyalty and is deemed fraudulent. . . ." *Pollitz v. Wabash R.R.,* 207 N.Y. 113, 127; 100 N.E. 721, 724-725 (1912); *Pigeon Point Ranch, Inc. v. Edward S. Perot, et al,* 28 Cal. Rptr. 865; 379 P. (2d) 321 (1962); *Continental Sec. Co. v. Belmont,* 206 N.Y. 7, 18; 99 N.E. 138, 142 (1912); *Bailey v. Jacobs,* 325 Pa. 187, 200; 189 Atl. 320, 327 (1937).

Each concealment to the date of the Sherwood conference in January, 1959 was built one upon the other, each necessitated by an earlier deceit. But the acts of deception did not stop. They continued and, like a cancer, grew on past deception.

July Loan Perpetuates Dishonest Concealments and Misrepresentations

By April, 1959, the Walker accounts were again delinquent. Again the overdraft situation arose. Be-

tween April 20 and 23, checks in the sum of $39,000 were kited between Walker and Chamberlin.

From March 31 to July 31, 1959, S&R found it necessary to advance $101,000 to Kennewick to correct overdrafts (Tr. 1670). On July 31, 1959, the Walker loans were again delinquent. Once again the loans were consolidated for $47,716.91. The necessity to place Walker on the delinquency list had been evaded. On this loan additional security was not obtained — security was released. Palmer Walker, once liable personally on the entire debt, was released except for the first $15,000. Substantial assets of Walker Motors, Kennewick and Union Gap, were released. To be sure, some assets were transferred to Tri-City Rambler, but the net result was a substantial loss of security (R. 20-23; Tr. 772-776, 796, 798, 801, 873-874, 1065-1073).

The new loan was duly reported on the Finance Loan Register, but the delinquencies necessitating the loan and the loss of security were not. Chamberlin testified at length that the November loans had been well secured. When questioned about the July loan, he opined that all the earlier security was not necessary (Tr. 2027-2033).

Chamberlin denies all knowledge of Walker's financial statements. When pinned down, however, he admits having statements in his file for February and March, 1959 (Tr. 2120), the fall of 1959 (Tr. 2118, 2119), and for early 1960 (Tr. 1751, 1778, 1780, 2128-2130). Each of these statements was fraudulent (Pl. Exs. 53, 53A-F, 54, 54-A, 55, 55-A, 56; Def. Exs. A-17, A-32, A-33; Tr. 657, 658, 1386). The loans made by

Chamberlin were not reflected honestly in these statements. Chamberlin alone, in the S&R organization, was aware of the facts which showed the statements to be false on their face. Yet Chamberlin permitted both the bank and Strong to rely on their accuracy without explanation. This is not conjecture, for one need only examine the face of these statements in light of the Chamberlin loans to realize their fraudulent nature (Pl. Exs. 68-A, 74, 75, 76, A-17).

It is admitted that between October 1, 1958 and March 25, 1960, an additional 22 cars representing $49,440.93 were sold out of trust (R. 23; Tr. 760; Exs. 61, 62, 63). Chamberlin's excuse is that a mixup with Rambler prevented him from determining the true picture for 60 days. But six months, not 60 days, elapsed after Chamberlin was informed of the situation (Tr. 772-776, 873-874, 876, 2033; Pl. Exs. 63, 64, 65). Yet at the time of the Strong report of February, 1960, Chamberlin was still practicing his deception through the use of Walker's fraudulent statements and complete silence on the Walker-Chamberlin dealings that had transpired since 1957.

Accordingly, having reported to Walla Walla only skeletal facts relating to Walker, Chamberlin in March, 1960, took control of the situation and proceeded to negotiate privately through his attorneys for some type of saving agreement that would continue to hide the past deceptions and be exculpatory of both Walker and Chamberlin.

Chamberlin was attempting to repeat in 1960 the successful concealments made possible by the Novem-

ber, 1958 and July, 1959 loan consolidations. On this occasion, though, conditions had become so bad that he was forced to divulge some information to S&R in February and March, 1960. Thereafter he took control of the situation. The proposed Refinancing Agreement (Def. Ex. A-23) did not reveal the true state of Walker's financial condition and did not reveal Chamberlin's past deceptions. Basically this proposed agreement called for the infusion of large amounts of capital into Walker's operation. Had the agreement been signed, Walker would have again been put on a current basis and Chamberlin's manifold deceptions would have had to wait future discovery.

It is to be noted that the proposed agreement prepared by Chamberlin and Robert Day was never presented to Walla Walla until ready for signature (Tr. 1845). The Englund report delayed consummation of the agreement and resulted in S&R's insistence on a complete audit (Defs. Ex. A-20; Tr. 1632-1634).

Yet Chamberlin, aware of the true gravity of the situation, on May 2, 1960 made a $9,000 unsecured loan to Walker thus worsening an already critical situation. This loan appeared on the Finance Loan Register, but not until month's end.

A bad loan can be excused on the basis of poor business judgment or negligence. But each loan made by Chamberlin represented a cover-up of material facts. When the first deception was followed by an ever-widening pattern of deception calculated to hide past deceptions as well as current, such acts cannot be dismissed as negligence or poor judgment.

Chamberlin was a fiduciary entrusted with the care of large amounts of money not his own (R.C.W. 23.01.-360). His duties as a fiduciary required at the very least strict accountability of funds. Because he violated his duty of honest disclosure, his duty of accountability, and because he pursued a calculated course of deception, the Walker losses ballooned to more than $127,000. Of this sum more than $80,000 is directly attributable to cars sold out of trust.

The fact pattern of the Walker-Chamberlin deals emphasizes the error of the Court in requiring the jury to find that Chamberlin intended to defraud S&R. St. Paul did not impose the requirement of "intent to defraud" in the bond. We wish to point out that St. Paul agreed to pay losses resulting:

> "By reason of the *fraud, dishonesty,* forgery, theft, larceny (whether common-law or statutory), embezzlement, wrongful abstraction or misappropriation, *or any other dishonest,* criminal or fraudulent act . . . whether committed directly or in connivance with others." (Pl. Ex. 1.)

St. Paul used the word 'dishonesty' twice, once together with all crimes of intent and again to include *"any other dishonest . . . act"*. This covenant is as broad as it could be made. Having once stated that the bond insured against any dishonest act, it would be redundant to insure also against any other dishonest act unless to eliminate any possibility that intent to defraud be made a condition of liability.

"Contracts of insurance, like other contracts must be construed according to the terms which the parties have used, to be taken and understood, in the absence

of ambiguity, in their plain, ordinary and popular sense." *Bergholm v. Peoria Life Insurance Co.,* 284 U.S. 489; 52 S. Ct. 230-231; 76 L. Ed. 416.

Concealment and misrepresentation of material facts are dishonest acts. Each of Chamberlin's concealments and misrepresentations was done with an intent to deceive, but intent to commit a dishonest act and intent to defraud are two vastly different things.

The cases cited by both parties require that a dishonest act be done intentionally and not as the result of negligence. The case of *Mortgage Corporation of N. J. v. Aetna Casualty & Surety Co.,* 115 A. (2d) 43, discussed at length by both parties, holds simply that conduct which is wilfully, intentionally and grossly faithless is conduct which is intentionally dishonest. The Aetna case distinguishes dishonesty from fraud. It does not require that an employee intend to harm his employer. It requires that the employee do an intentionally dishonest act.

The Court ignored the distinction between fraud and dishonesty imposed by the repeated use of the word 'or' in the bond, and by requiring the jury to find "intent to defraud". Thus the element of dishonesty was eliminated from the case. Plaintiff's requested instruction No. 31 would have corrected the error if the instructions objected to had been eliminated or modified to omit the requirement of intent to defraud.

C. THE NICHOLSON TRANSACTIONS

The full story of the Nicholson transactions is set forth at pages 31-39 and 64-67 of our opening brief.

Appellee denies that Chamberlin converted the Simca car or the check for $454.21 (Pl. Ex. 35). These denials are unsupported by any reference to the record.

The evidence detailed by us in respect to the $454.21 check is sought to be refuted by the following statement alone (Appellee's Brief, p. 37):

> "Although the rebate charges of $454.21 were credited to Nicholson's loan, the check was written directly to Fairway Finance—Kennewick, covering this item in accordance with the bookkeeping practices of S&R." (Plaintiff's Exhibit 35)

Appellee ignores the undisputed evidence. The $454.21 check was issued one day after credit was given Nicholson, was endorsed in blank by Fairway and ultimately made up part of the cash receipt for which Chamberlin admits he received credit (Tr. 291).

Conversion of the Simca car is explained by appellee by the following statement:

> "Chamberlin paid the $1,300 to S&R by making a loan with S&R on his MG." (Appellee's Brief p. 38).

Appellee admits that the Simca was used as a trade-in on the MG while failing to deny that, at the time of the trade, the Simca was owned by S&R. Appellee gives no explanation nor cites any reference to demonstrate the manner of repayment. The Nicholson and Chamberlin loan accounts do not reflect payment (Pl. Exs. 26, 27, 28, 37, 38). Even if appellee's contention is accepted, the fact remains unaltered and undenied that Chamberlin converted the Simca when he traded this car, the property of S&R, for the MG.

We earnestly urge the court to examine Exhibits 26, 27, 28, 29, 30, 31, 32, 33, 35, 37, 38 and A-10. These ex-

hibits, supported by the testimony cited by both parties in their briefs, demonstrate Chamberlin's conversions beyond any reasonable doubt.

A bank teller who made the same use of bank funds that Chamberlin did of the Simca and the $454.21 would be an embezzler. Is Chamberlin less an embezzler because he converted a car and a check?

D. THE SECURITIES ACCEPTANCE CORPORATION MATTER

Appellee admits that Chamberlin used suspense account funds for the period January 31, 1958 through March 6, 1958 (Appellee's Brief 38-39). The real importance of this transaction (this is only one example taken from the record and there were many) lies not in the fact that Chamberlin avoided the payment of interest, but that he "borrowed" without permission funds owned by others for his own use (Tr. 1673-1677). The fact that he repaid the money does not distinguish this action from any other case of embezzlement (R.C.W. 9.54.010(3)). It matters not that Chamberlin travelled a great deal during this period. The wrong occurred at the moment Chamberlin took money from the suspense account. Since the suspense account had to be closed at the end of every month and the account balanced at zero, unpaid borrowings had to be replaced. Unauthorized suspense account withdrawals could have contributed to the overdraft situation.

E. LIVINGSTON-BLACKBURN DEAL

Twenty-five dollars is a small sum. Appellee admits Chamberlin received this amount as the difference be-

tween the Livingston and Blackburn sale prices (Appellee's Brief, p. 39). Chamberlin was entitled to nothing. This sum should have gone to Livingston, Blackburn, Williams or S&R. A small amount, perhaps, but symptomatic of all the Chamberlin dealings.

ERRORS 6 AND 7
THE COURT ERRED IN EXCLUDING THE ADMISSIONS OF ST. PAUL'S AGENT

Rivon Jones was a claims agent and attorney for St. Paul. Admissions were made by Jones while in the process of adjusting S&R's claim and were within the scope of the business he was authorized to transact. Jones was not available as a witness since St. Paul claimed privilege (Tr. 1472). An attorney or agent who makes an admission within the scope of special authority (e.g. claim adjusting) may bind his client. 7 Am. Jur. (2d), Attorneys At Law, §122, p. 122; *Armstrong v. Goldberg,* 190 Wash. 210, 67 P. (2d) 328. Jones had no motive to falsify, the facts were known to him, and the statement was against St. Paul's pecuniary interest. The excluded testimony was proper as rebuttal and as an admission.

CONCLUSION

Chamberlin's actions may be summed up by a paraphrase of a quotation from the Aetna case set out in appellee's brief at the top of page 63.

> "It seems to us that in the instant matter we likewise could not properly stand by and permit the jury finding that the *admitted or undenied* derelictions of Chamberlin were not dishonest within the bond coverage. We are not dealing with an instance of neglect,

mistake or incompetence; *nor are we dealing with an isolated inadvertent or insignificant delinquency by an employee. What Chamberlin did was done wilfully over a period of thirty months.*" (Emphasis supplied)

Robert Chamberlin may not have intended to harm S&R or deprive it of a right. Intent to harm or deprive are tests of fraud, not dishonesty. An intentionally dishonest act may be committed absent the motives of harm or deprivation. Dishonesty is defined as:

"Want of honesty, probity, or integrity in principle; want of fairness and straightforwardness; a disposition to defraud, deceive or betray; faithlessness." *Webster's International Dictionary, Second Edition.*

One is presumed to intend the consequences of his acts. It follows that one who intentionally commits a dishonest act, but without "intent to defraud", is responsible for any loss sustained. This was the intent of the bond.

St. Paul insured against dishonesty. The court eliminated that issue when it compelled the jury to find "intent to defraud."

We submit that Chamberlin was guilty of dishonesty as a matter of law, and in fact was guilty of fraud and embezzlement.

We respectfully urge that each of the points raised upon appeal is well taken and warrants reversal.

Respectfully submitted,

WILLIAM M. TUGMAN
SHERWOOD, TUGMAN AND GREEN
Attorneys for Appellant

CERTIFICATE

I, the undersigned, do hereby certify that in connection with the preparation of this Reply Brief, I have examined Rules 18 and 19 of the U. S. Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing Brief is in full compliance with those Rules.

WILLIAM M. TUGMAN

SHERWOOD, TUGMAN AND GREEN
Counsel for Appellant

APPENDIX

OF

APPELLANT

APPENDIX

Exhibit 84

SHERWOOD & ROBERTS, INC.

Post Office Box 1020 *106 North Second Avenue* *Telephone JA 5-3500*
WALLA WALLA, WASHINGTON

Date 10-10-58

To Robert Chamberlin
Sherwood & Roberts—Kennewick, Inc.

From Bert R. Edwards

Subject An Outline of Pending Matters

4. Confirming our conversations with respect to cash control at all of your offices in the Tri-City area, please be assured of our earnest effort to get you on a sound basis. In advancing $12,000.00 October 8 to Sherwood & Roberts-Kennewick, we did so on your statement that the advance would repay all borrowings from Fairway. It is agreed that you will not permit or countenance any inter-company borrowings in your offices except advances from Sherwood & Roberts-Kennewick to your Richland office. If you need additional funds to overcome book overdrafts, please advise me and the funds will be advanced accordingly. Effective immediately we will not countenance a bank overdraft on any account in your office nor will we permit a book overdraft to go unexplained. We expect to review your cash reports daily. The record shows that Fairway Finance Company-Kennewick had four bank overdrafts in September, seven overdrafts in June, four overdrafts in July and a monthly bank service charge in excess of $80.00.

Upon receipt of your request for funds to correct all overdrafts, we shall place you in a workable position for the last time. You may anticipate that any advances made are temporary and subject to repayment prior to year's end as quickly as you can amortize loans receivable.

5. To place your transfer of loans to Richland in a workable accounting position, we have advanced $63,000.00 to Sherwood & Roberts-Kennewick for transfer to Sherwood & Roberts-Richland. $45,000.00 has been paid by Richland to Fairway Finance Company-Kennewick and then by Fairway Finance-Kennewick to Fairway Finance-Walla Walla. $18,000.00 has been paid by Richland to Sherwood & Roberts-Walla Walla. This clears the transaction satisfactorily.

6. Prior to the close of business in October would you please furnish us a list of all receivables due from employees by name, amount, security, date of last payment and remarks.

7. It would be to your advantage to clear Cabadab off the record prior to the close of business in October.

   It would be of material assistance for you to prepare a statement with respect to the discontinuance of wash transactions with Walker Motor Company.

As I told you earlier this week when we were together in Walla Walla, we have a high regard for your energy and application to the duties of your office and for your ability to produce a volume of business and

to inspire your associates in the handling of this volume. Some of the practices in your office are the acme of the hard way of accomplishing an objective. You should call upon the specialized staff at Walla Walla for assistance in smoothing out some of your problems. We are all willing to help you improve your procedures and reduce your overhead.

Kindest personal regards and best wishes.

SHERWOOD & ROBERTS, INC.

vkf

CHAMBERLIN — CROSS

(Line 21, Page 2113 thru Line 21, p. 2114)

Q. Isn't it a fact, Mr. Chamberlin, when you came to see Mr. Sherwood that you brought your file, your dealer's file, with you?

A. I brought the file pertaining to it, yes.

Q. And isn't it a fact, Mr. Chamberlin, that Mr. Sherwood when you mentioned you were taking on this line of flooring asked you questions about it?

A. We discussed it.

Q. Isn't it a fact that he asked you what kind of a dealer Mr. Walker was, or European Motors?

A. I think he did, yes.

Q. Did he ask you about the financial stability of Mr. Walker or European Motors?

A. I think there was some discussion, yes.

Q. Didn't you have with you at that time your letter of December 18th to American Motors?

A. I think a copy of it would have been in the file, yes.

Q. And didn't you show that letter to Mr. Sherwood and let him read it?

A. I could have, yes.

MR. LONEY: Exhibit 68, if I may.

(The exhibit was handed to Mr. Loney.)

Q. And isn't it true that in that letter you showed to Mr. Sherwood you represented that Mr. Walker's business practices have been beyond reproach?

A. That statement was in the letter, yes.

CHAMBERLIN — DIRECT

(Line 3, p. 2019 through line 25, p. 2021)

Q. What was the situation with reference to your daily cash register? I don't know whether I have spoken of it correctly by name. The daily cash situation.

A. The daily cash summary?

Q. Yes.

A. Was a record that was kept daily. It showed the disbursements and the deposits of the previous day and the cash balance.

THE COURT: Cash register, do you call it?

A. Yes.

Q. (By Mr. Palmer) Now, you have told us what it was, but what was the situation?

A. Well, the situation during this period of time was that we were showing a book overdraft daily, and which indicated we did not have enough funds to cover our commitments, or our disbursements.

Q. Did Mr. Edwards advise you that he didn't like it?

A. Yes, he did.

Q. Did you later take up this book overdraft situation with Donald Sherwood?

A. I did not take it up with him. He called me and related that he was conscious of what was — what the situation was, wanted to put me on notice that a book overdraft was one thing. However, if the book overdraft resulted in a bank overdraft, that I would be, in his terms, and I quote, standing alone. In other words, —

Q. That's what he said?

A. Right. I might explain, I don't want to create the impression that Sherwood & Roberts was financially — had problems on credit lines. A lot of the problems stems from the fact that you may have a line at a bank and say the maximum line that the bank can loan to one borrower might be, for the sake of illustration, a million dollars. So when that line was reached, through no fault of Sherwood & Roberts or the bank either, when the maximum had been reached that that bank could loan to an individual borrower, it served the same pur-

pose as being out of money. But I do want to make that statement.

Q. Very well.

THE COURT: I would like to ask a question.

THE WITNESS: Yes, sir.

THE COURT: Was this a period, if you know, when the commercial banks generally were starting to tighten up on their loans or liberalize them, or what was the sitlation?

A. I do not know that. I do know, however, that Mr. Sherwood attempted to arrange these bank lines, and sometimes his predictions would fall short and we would run into a tight money situation.

Q. (By Mr. Palmer) Now, did Mr. Sherwood call you when the home office or the parent corporation had additional funds to put into your outstandings?

A. Yes, he would. On occasion another office would dispose of a line and there would be a surplus of funds, Mr. Sherwood would call me and state, "We're back in business. Have X number of dollars, and let's get it out."

Q. Now, why did you make these exchange of checks with Walker Motor Company, Inc.?

A. The exchange of checks with Walker Motor were for the purpose of erasing the book overdraft so

that on the end of each month when we made our closing, why we would show a cash balance.

Q. Was this stopped after December 31, '58?

A. No. As I recall, there were a couple incidents in 1959, the spring of 1959.

Q. Did it occur after that?

A. No, it did not.

Q. Now, —

THE COURT: Do you mean it didn't occur after the couple of instances in 1959?

A. Yes.

MR. PALMER: I think the exhibit shows one instance, your Honor, in 1959."

No. 17954

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHERWOOD & ROBERTS-KENNEWICK, INC., a Washington corporation,
Appellant,

vs.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Minnesota corporation,
Appellee.

No. 17954

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLEE

FRED C. PALMER
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Yakima, Washington

Attorney for Appellee

No. 17954

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Yakima, Washington
Attorney for Appellee

SUBJECT INDEX

TABLE OF CASES

TEXTS

APPENDIX

PRELIMINARY STATEMENT

This appeal involves a review of an action tried before United States District Judge William T. Beeks sitting with a jury at Yakima, being in the Eastern District of Washington, Southern Division. As indicated by appellant, jurisdiction is based upon diversity of citizenship, the plaintiff-appellant being a Washington corporation and the defendant-appellee being a Minnesota corporation.

Appellee will adopt the designation set forth in appellant's brief and hereafter plaintiff-appellant will be referred to as "S. & R." and the appellee will be designated as "St. Paul".

This action arises out of a "Mortgage bankers blanket bond" issued to S. & R. by St. Paul in the blanket sum of $250,000.00. Covered under the bond by St. Paul are the employees of some seventeen corporations, all being subsidiaries or under the general supervision of the home office in Walla Walla, Washington, being Sherwood & Roberts, Inc. Claims were made by S. & R. against four employee-principals under the bond, being Robert D. Chamberlin, Dean Dion, John Koster and Kermit Krueger.

Trial of the action commenced on November 20, 1961, and was concluded upon December 12, 1961, with the jury finding in favor of St. Paul as to St. Paul's liability under the bond.

Under the pretrial order the parties had stipulated that only the issue of liability of St. Paul under its bond would be submitted to the jury, with the question of damages, if the jury found liability, being reserved for determination at a later trial. (R. 46) The question of liability was submitted to the jury in the form of interrogatories. The interrogatories covered the "Walker transactions" and the "Williams transactions". A general interrogatory was asked in relation to each of the above transactions with the jury being instructed that in the event they found fraud or dishonesty, in any connection with reference to either of said transactions, they were then required to answer separately a series of interrogatories concerning the fraudulent transaction. Since the jury answered the general questions on each transaction in the negative, it was not necessary for them to further consider the individual questions under each transaction. (R. 129-132)

COUNTER-STATEMENT OF THE CASE

Appellant in many instances in its statement of the case presents to the court only the evidence most favorable to the appellant's contentions. For this reason appellee feels required to set forth the evidence most favorable to the appellee and upon which the jury based its verdict in favor of the appellee.

(1)

THE WALKER TRANSACTIONS

In considering all phases of the various loans made to

the Walker Companies and Palmer Walker personally, consideration should first be given to the importance of the income to S. & R. received from the Walker Companies. During the period of time of 1953 to 1959 Walker Motors - Kennewick paid off loans to S. & R. in the total amount of $1,606,000.00. Walker Motors - Union Gap between the periods 1955 and 1959 paid off a total of $648,-428.00; Tri-City Rambler and European Motors during the period 1957-1959 paid off principal loans of $66,-098.00; Palmer Walker personally during all of these periods paid off a total sum of $37,300.00. The total of loans paid off by Palmer Walker personally and by his companies is the sum of $2,357,826.00 during the period of 1953 to 1959. The total interest charged and received by S. & R. upon these loans is the sum of $48, 187.00 (Last Page Defendant's Exhibit A-19) The Exhibit referred to is a report from W. G. Strong, treasurer of S. & R. Inc., the parent corporation in Walla Walla, to Donald Sherwood, the president, dated February 15, 1960. During the period 1956 to 1959, S. & R. received from consumer contracts purchased from Walker Companies, discounts in the total amount of $88,615.96. This represented 22.9% of the total discounts to be received by S. & R. from all sources on consumer contracts. (Defendant's Exhibit A-28) The total gross income received by S. & R. from either direct loans to Walker Companies and Palmer Walker or from consumer paper

generated by the Walker Companies and sold to S. & R. is the sum of $136,802.96.

(2)

THE LOANS MADE TO WALKER COMPANIES

On April 15, 1957, Robert D. Chamberlin on behalf of S. & R. made a loan to Walker Motors - Union Gap in the sum of $5,550.00. This loan was evidenced by a note and the note was secured by the assignment of another note executed by Walker Motors - Union Gap to Palmer Walker, individually. On July 31, 1959, the unpaid balance upon this loan was the sum of $3,107.36. (R. 20-21)

On November 19, 1958, Chamberlin on behalf of S. & R. made flooring loans on radios and boats to Walker Motors of Kennewick and to Palmer Walker d/b/a Walker Enterprises. These two loans were actually made before the above date and were evidenced by separate notes but upon November 19, 1958, they were consolidated in the sum of $13,974.34. In addition to the security of radios and boats, the consolidated loan was personally guaranteed by Palmer Walker. The balance due on July 31, 1959, on this loan was $9,360.87. (R. 21, Plaintiff's Exh. 61, R. Vol. 9, p. 2003-2004) This loan appeared, as did all loans on the monthly finance loan register forwarded to Walla Walla (Defendant's Ex. A-10)

Between December 26, 1957, and November 19, 1958, Robert D. Chamberlin, or employees acting under his di-

rection, on behalf of S. & R. made flooring loans to Walker Motors - Kennewick, each loan being evidenced by a note, which note was secured by chattel mortgage on certain motor vehicles. On November 19, 1958, there remained unpaid on these various loans the sum of $20,218.20. (R. 21) Between May 28, 1957, and January 14, 1958, Robert D. Chamberlin or employees acting on behalf of S. & R., made flooring loans to European Motors Inc. covering motor vehicles and secured by chattel mortgages on said motor vehicles, and on November 19, 1958, there remained due on said loans the sum of $12,371.95 (R. 22). About a month or six weeks prior to November 19, 1958, Dean Dion, an employee of S. & R., working under Mr. Chamberlin, reported to Chamberlin that it appeared various vehicles floored on both loans had been sold without S. & R. being paid. Dion thereafter verified it and spoke to Walker in regards to pay-off but was unsuccessful in getting the money and so reported to Chamberlin. Chamberlin then contacted Walker and asked him point-blank what the situation was and whether or not he had sold vehicles "out of trust". Walker told Chamberlin that vehicles had been sold without being paid for. Dion and Chamberlin then discussed the problem and had some differences of opinion as to how to handle it. Dion's first impulse was to call the account but Chamberlin determined to analyze the situation, and consider the previous experience with Walker and the caliber of paper he had been generating

for them on consumer contracts. Chamberlin met with Walker and explained the situation, including the alternatives. Walker was very disturbed about the situation and told Chamberlin that the decision was his. Walker further advised Chamberlin that his business manager, Mr. Bishop, had handled the transactions during this time and that he had relieved Bishop of his responsibilities. Chamberlin then determined in his business judgment to collateralize both of these loans and continue doing business with Walker. (R. Vol. 9, pp. 2005-2007) Both of these loans were then rewritten, the Walker Motor Co. - Kennewick loan being in the amount of $20,218.20 and being secured by shop equipment, parts, inventory and leasehold improvements, together with Walker's personal guaranty. The European Motors Inc. loan was rewritten in the amount of $12,371.95 and likewise secured by equipment, tools, parts inventory and leasehold improvements on that business together with Palmer Walker's personal guaranty. (Plaintiff's Exhibit 61, R Vol. 9, p. 2007)

On July 31, 1959, the balance due on the loan to Walker Motors - Kennewick was the sum of $19,254.05. On the same date the balance due on the European Motors Inc. loan was the sum of $11,854.63 (R. 21-22).

On December 8, 1958, Chamberlin on behalf of S. & R. loaned Palmer Walker personally the sum of $15,000.00 which was evidenced by a note signed by Walker

and his wife. This loan was made for the purpose of enabling Walker to purchase parts, equipment and miscellaneous items in connection with Walker's acquiring the Rambler franchise from American Motors. (R. Vol. 5, pp. 1037-1038) On January 15, 1959, the sum of $11,000.00 was paid back to S. & R. on this loan and upon July 31, 1959, the balance due on this loan was the sum of $4,-140.00. (R. 22)

All of the above loans appeared on the monthly finance loan register for November, 1958, and December, 1958, forwarded in the regular course of business to Sherwood & Roberts, Inc., Walla Walla. (Defendant's Ex. A-10) All loans made by S. & R. and pursuant to the regular business routine maintained by Robert D. Chamberlin as manager appeared on the loan register. (R. Vol. 4, pages 843-853; 896-898) No one in executive authority in Sherwood & Roberts Inc. in Walla Walla looked over the monthly finance loan registers to see what large loans were being processed at the branches, however. (R. Vol. 5, p 1224)

In connection with these various loans it should be considered that Mr. Donald Sherwood, President of S. & R., did not provide the S. & R. employees with a manual of procedure as he did not believe in them. (R. Vol. 5, p 1224) Another important consideration is the fact that all Sherwood & Roberts branch organizations are de-central-

ized and managers, such as Robert D. Chamberlin, were completely self-sufficient. Each manager is in complete authority as to the area he serves. (R. Vol. 5, pp. 1128-1129, testimony of Donald Sherwood)

(3)

THE RAMBLER FRANCHISE NEGOTIATIONS

During the latter part of 1958, Palmer Walker determined that it was necessary to secure a better selling car for European Motors to handle. He made this determination in view of the fact that European Motors had been losing money and had discussions with the district manager for American Motors preliminary to securing the franchise. (R. Vol. 5, pp. 1032-1033) On or about December 15th or 16th, 1958, Walker called Chamberlin, advising him that a field representative of American Motors was going to be in town and that they were working on the Rambler Franchise. This was already known to Chamberlin. Walker requested that Chamberlin have lunch with the American Motors representative, Mr. Townsend, for the purpose of discussing the new Rambler location and Walker's application for the franchise. At the luncheon meeting Chamberlin told Townsend of American Motors of the advisability of locating the Rambler franchise in Kennewick, and further advised Townsend that S. & R. were doing business with Walker and were prepared to handle the volume of Ramblers as to flooring. Chamberlin was then asked to write a letter to American Motors and

did write the letter of December 17, 1958 (Pl. Ex. 68). Chamberlin in this letter committed S. & R. to a flooring line of $100,000.00 in anticipation of the Rambler franchise being granted and also made personal comments about their previous experience with Walker. This meeting was held approximately a month after the consolidation and collateralizing of the loans of November 19, 1958. Chamberlin at that time regarded his relationships with Walker as being excellent and the previous problems of November, 1958, were a closed book, having been collateralized by a capital loan. S. & R.'s experience as far as repossessions on cars sold by Walker, and financed through S. & R. had been excellent, there being only two Volkswagens repossessed during their entire experience with Walker. (R. Vol. 4, p. 827) Chamberlin had no knowledge of the financial statement of European Motors that was mailed to American Motors by Palmer Walker. Chamberlin did not see this financial statement prior to the trial. (R. Vol. 9, p. 2014) After making the commitment to American Motors, Chamberlin on December 30th, 1958, forwarded to American Motors, wholesale drafting instructions for the Tri-City Rambler Inc., which was the new name of European Motors. Problems developed, however, as far as the drafting instructions were concerned because S. & R. was not a nationally recognized finance organization and for that reason were not acceptable to American Motors.

Chamberlin called Donald Sherwood to discuss the problem and then made a trip to Walla Walla with the drafting instructions and the franchise agreement. At no time did he have the financial statement introduced in evidence, (Plaintiff's Ex. 68-a) which statement was secured from the files of American Motors shortly before trial. (R. Vol. 4, p. 963) Shortly after this meeting with Sherwood in Walla Walla, Chamberlin talked to Mr. Stricker of the Seattle First National Bank in Richland and the Seattle First National Bank agreed to honor the drafts of American Motors on Ramblers shipped to Tri-City Rambler Inc., provided S. & R. would enter into hold-harmless agreement. Chamberlin then called Donald Sherwood, advising him of the solution to the matter of drafting that Chamberlin had worked out and Sherwood granted Chamberlin the authority to sign the letter of guarantee. The flooring commitment to Tri-City Rambler Inc. had been previously made on December 17, 1958 and in Chamberlin's discussion with Donald Sherwood he did not ask for flooring authority as it was, of course, evident that the commitment had been made in the letter. (R. Vol. 9, pp. 2010-2018)

(4)

EXCHANGE OF CHECKS BETWEEN WALKER MOTORS - KENNEWICK AND S. & R.

Dennis C. Hayden was the accountant for all of S. & R.'s Pasco, Kennewick and Richland offices. His duties

were to handle all accounting procedures, including reporting of all the Tri-City offices, and making certain that the bookkeeping procedures were proper. A daily cash report was prepared by all of the Tri-City Branch offices, reflecting receipts, disbursements, and cash in bank; which was forwarded daily to Walla Walla. (R. Vol. 7, pp. 1651-1652)

The daily cash report forwarded to Walla Walla showed a book overdraft situation daily, particularly during the period of the fall of 1958, through the spring of 1959. Chamberlin was experiencing difficulty in getting enough funds to take care of the volume of business committed in the Tri-City area and further demands were being made upon him by Walla Walla to return funds. (R. Vol. 9, pp. 2018-2019) Because of the overdraft situation on the books of S. & R., together with the further fact that at the month end the books could not be closed unless they were in the black, the trading of checks with Walker Motors-Kennewick was temporarily instituted. While this perhaps was an unusual accounting procedure, it did not result in any loss whatsoever to S. & R. (R. 7, pp. 1657-1658, Dennis C. Hayden)

Although Bert Edwards of the executive committee in Walla Walla knew of this overdraft situation on the books of S. & R., and advised Chamberlain to stop it, Donald Sherwood, President of the Company, tacitly approved the practice as long as Chamberlain did not get

caught in a bank overdraft situation. Chamberlin testified to this conversation as follows:

> "A. I did not take it up with him. He called me and related that he was conscious of what was—what the situation was, wanted to put me on notice that a book overdraft was one thing. However, if the book overdraft resulted in a bank overdraft, that I would be, in his terms, and I quote, 'standing alone' ".

(R. Vol. 9, pp. 2019-2020)

This testimony of Robert Chamberlin was never refuted on rebuttal by Donald Sherwood. Whenever an exchange of checks was made, no notes were marked "Paid" or chattel mortgages satisfied, thus the security remained the same. Each check transaction balanced the other out (R. Vol 6, pp. 1397-1398, testimony W. G. Strong).

(5)

CONSOLIDATION OF LOANS ON JULY 31, 1959, IN THE AMOUNT OF $47,716.91

The parent corporation of Sherwood & Roberts in Walla Walla was advised of the fact that the Walker Companies in Kennewick had sold cars "Out of trust" by Dean Dion. W. G. Strong, treasurer of the Walla Walla corporation, during a visit to Kennewick in the early part of 1959, had a conversation with Dean Dion during which conversation Dion not only told Strong that they had problems with Palmer Walker but also that they had some

cars out of trust in 1958 and that Walker owed them considerable money. (R. Vol. 9, pp. 1971-1972) From November 19, 1958, to the fall or late fall of 1959, there were no "out of trust" transactions by Walker. (R. Vol. 9, p. 2022)

During the late spring of 1959 S. & R. in the Tri-City Area was in an extremely tight money situation. Chamberlin was requesting funds from Walla Walla but only receiving a limited amount, it not being enough to take care of their business committments. Likewise, it was not possible to forward funds to Walla Walla, as was being demanded. Chamberlin discussed the situation with Strong, advising him that if they could not get funds, then the only other alternative was to get rid of some of their dealers. Strong agreed that it would be advisable to get rid of Walker Motor-Kennewick as a flooring account because of the heavy demand by Walker for Volkswagen flooring. Chamberlin saw Walker and requested that he seek other financing for this corporation, as S. & R. could no longer carry the volume of business that Walker was producing. (R. Vol. 9, pp. 2022-2026)

Chamberlin made a determination as to the assets of Tri-City Rambler Inc. available to secure the loan. He determined that the total valuation of all security was $61,313.25 which includede Palmer Walker's personal guarantee in the sum of $15,000.00. (R. Vol. 9, pp. 2027-2028) Contained in Pls. Exhibit 58, which is the S. & R.

file on this loan, is a letter dated August 3, 1959, from Chamberlin to Iver Turnquist, an employee in the S. & R. office. In this letter Chamberlin directed Turnquist to close the loan and on the chattel mortgage from Tri-City Rambler Inc., all physical assets of the corporation were to be listed, together with accounts receivable and the assignment of reserves then accrued in the S. & R. office and all that would accrue in the future to Walker Motors-Kennewick, Walker Motors-Union Gap and Tri-City Rambler Inc.

Pursuant to these directions, Turnquist consolidated the five previous loans discussed *supra* in their then unpaid balances, which totalled $47,716.91. A note was prepared, signed by Tri-City Rambler Inc., through their corporate officers with a personal guarantee by Palmer Walker for the first $15,000.00, all with interest at the usual 12% charged by S. & R. Attached to the letter to Turnquist was a check presumably from Walker in the amount of $1102.83 covering interest to date on the loans being consolidated. This loan was reported in the routine manner on the monthly loan register, dated August 20, 1959, and forwarded to Walla Walla. (Page 3, Defendant's Exhibit A-10)

Chamberlin had no knowledge that Tri-City Rambler Inc. was losing money between November 30, 1958, through July of 1959. (R. Vol. 9, 2120) The situation on Tri-City Rambler Inc.'s loss position was not brought out

until the certified audits were made in June and July of 1960. As a result of S. & R. being relieved of flooring commitments to Walker Motors-Kennewick by reason of the loan consolidation and its assumption by Tri-City Rambler Inc., Chamberlin was able to return to the Walla Walla office from S. & R. in Kennewick during the next 90 days, approximately $125,000.00. The daily cash report also returned to the black. (R. Vol. 9, p. 2033 and R. Vol. 7, p. 1653)

The chattel mortgage securing the loan above discussed was re-filed the latter part of September or October 1959 due to the fact that the chattel mortgage originally taken was not filed within the statutory ten day period. (R. Vol. 4, pp. 833-834) This is mentioned on page 22 of appellant's brief but no significance attaches to this re-filing.

(6)

SITUATION ON FLOOR CHECKING RAMBLERS IN THE FALL OF 1959 AT TRI-CITY RAMBLER, INC.

On page 22 of appellant's brief, testimony is referred to indicating that cars were out of trust in the fall of 1959, which was reported to Chamberlin by Dennis Englund and Dean Dion. At this time S. & R. was not flooring any Volkswagens, as the July 31, 1959 loan consolidation had eliminated Volkswagen flooring. Ramblers were, of course, being floored for Tri-City Rambler, Inc. While

it is true certain Rambler automobiles were not present at the time Dennis Englund made floor checks in the fall of 1959, this situation was brought about by an error on the part of American Motor Company shipping cars without invoices and sending invoices without shipping cars. This made it very difficult to determine whether or not cars were actually missing, and for a period of sixty days the true picture was not evident. (R. Vol. 4, pp. 877-878, Denny Englund; R. Vol. 9, pp. 2033-2034, Robert Chamberlin; R. Vol. 5, pp. 1121-1122, Palmer Walker)

When this matter was reported to Chamberlin, he checked it out and discovered the mixed-up shipping situation at American Motors. As a consequence Chamberlin took no action at this time.

(7)

TEMPORARY FLOORING OF VOLKSWAGENS IN DECEMBER, 1959

In December of 1959 Palmer Walker told Chamberlin that the National Bank of Commerce in Kennewick had refused to furnish funds so that Walker Motors Kennewick could pay for a boat-load of Volkswagens; that the National Bank of Commerce had requested Walker to pass this particular boat-load. Walker wanted S. & R. to floor this load and discussed it with Chamberlin. Chamberlin told Walker that they had previously agreed that the Volkswagen corporations were no longer to be floored by

S. & R. and that he could not grant a dealer agreement to Walker on the Volkswagens. Chamberlin did, however, make a commitment to floor one boat-load of Volkswagens so that it would not have to be passed. (R. Vol. 9, pp. 2034-2036)

These flooring loans were made on January 6, 1960 and appeared on the January finance loan register. (Defendant's Exhibit A-10, p. 4)

Early in January, 1960, Chamberlin called Donald Sherwood and related to him his conversation with Walker. Chamberlin requested that the Volkswagen flooring be returned to S. & R. Sherwood stated in effect to Chamberlin that since they had gotten rid of them last summer he didn't think they should handle them now. Chamberlin then told him that he had committed for one boat-load of Volkswagens and had floored them. Sherwood then told Chamberlin not to floor any more until they could look the situation over. (R. Vol. 9, p. 2037) Chamberlin at the time of the temporary flooring had no definite knowledge of Walker corporations selling cars "out of trust" since the fall of 1958.

(8)

W. G. STRONG REPORT TO DONALD SHERWOOD ON WALKER MOTORS OF FEBRUARY 15, 1960

Appellant has emphasized that the Strong report was prepared primarily from information and figures furnished

Strong by Chamberlin. Some enmity existed upon Chamberlin's part toward Strong which was based upon a statement made to Chamberlin by Bert Edwards of the executive committee in Walla Walla. In the fall of 1959 while Chamberlin and Edwards were in Seattle on S. & R. business, Edwards told Chamberlin in commenting about a lawsuit that had been commenced against S. & R. in Kennewick, that Strong appeared to be pleased about the lawsuits as he had his guns trained on Chamberlin. Edwards further told Chamberlin that he thought this might be significant. (R. Vol. 7, pp. 1610-1612) The above statement to Chamberlin by Edwards explains Chamberlin's instructions to Dion not to give any information to Strong.

On February 15, 1960, W. G. Strong prepared a report to Donald Sherwood on all Walker companies. (Defendant's Exhibit A-19). The preparation of this report was initated by Chamberlin's conversation with Don Sherwood requesting Sherwood to reconsider the Volkswagen flooring account. Sherwood requested that Chamberlin get together with Strong and give him a report. (R. Vol. 9, p. 2038) In securing information for the report, Chamberlin picked up the December 31, 1959 balance sheet and profit and loss statement for Walker Motors-Kennewick and Walker Motors-Union Gap (Defendant's Exhibits A-32 and A-33) Chamberlin also secured from the Seattle-First National Bank, Richland Branch, a copy of

Palmer Walker's personal financial statement. A monthly operating statement was secured on Tri-City Rambler with the understanding that a more detailed statement was being prepared.

Chamberlin working with Denny Englund, an S. & R. employee, made a further determination that $11,770.00 in cars had been sold "out of trust". Flooring figures were secured both on the Walker Motors in Union Gap and Kennewick as well as Tri-City Rambler. (R. Vol. 9, p. 2041) The Strong report (Defendant's Exhibit A-19) gives quite an accurate picture as to the financial condition of the Walker corporations. It indicates total indebtedness to S. & R. of $232,998.00, of which $26,000.00 was delinquent; an additional flooring indebtedness to the National Bank of Commerce of $44,500.00; 1959 operating results of Walker corporations were shown as follows:

Walker Motor Company-Kennewick, loss	($6,000.00)
Walker Motor Company-Union Gap	4,072.00
Tri-City Rambler, loss	(7,900.00)
Combined loss	($9,828.00)

The delinquency of $25,925.00 is itemized emphasizing the $11,770.00 of cars sold "out of trust", a part of this delinquency; analysis is made as to what it would take to handle the Volkswagen flooring account in the way of financing. Page 3 of the report lists the alternative to taking on the full line, emphasizing that it would be

liquidation and further indicating that the loss on liquidation would be approximately $40,000.00. The report was very carefully read by Donald Sherwood as is indicated on the exhibit by Mr. Sherwood's initialing and checking as well as commenting on the report. The report was a combined effort of Robert Chamberlin and W. G. Strong with Chamberlin furnishing the information from the books and records in the S. & R. Kennewick office.

On cross examination Strong admitted that he did not suspect the figures and at no time stated that the figures were incorrect. (R. Vol. 8, p. 1756) In his conclusion, Strong recommended taking on the Volkswagen flooring for two reasons: (1) They would be able to pick up additional security in a net amount of approximately $50,000.00 and that this would be very helpful in the event of forced liquidation; and (2) that if the account was handled firmly it should be in such a position by the year end that they could dispose of it easily or they might retain the account and liquidate other less favorable business.

Although the report on its face indicated a very serious financial situation and one that was steadily deteriorating as far as the Walker enterprises were concerned, still no action was taken by Walla Walla either to authorize a new loan to the Walker corporations or to foreclose. Also about this time Donald Sherwood left for Europe, it being about the first part of April, 1960. (R. Vol. 8, pp. 1758-

1759) Chamberlin thought that it was necessary that the Walker dealership find a "home" for its flooring and business and that otherwise there would be a potential loss. He computed this loss to be in the neighborhood of $35,000.00 and wanted to chattel all of the holdings of the Walker corporations through a security arrangement so that S. & R. would be better protected. (R. Vol. 9, p. 2044)

Prior to Donald Sherwood leaving for Europe, Chamberlin appeared at an executive committee meeting in Walla Walla on February 29, 1960, and emphasized that action should be taken one way or the other upon the report; that either S. & R. should secure themselves or get out. Immediately after Chamberlin made this statement, Donald Sherwood took the meeting over and spent the rest of the time pointing out Chamberlin's errors during the last two or three years. (R. Vol. 9, pp. 2046-2047) Chamberlin did not have authority to enter into any dealer agreement with Walker but he had reached the determination that the account could be saved and there would be no loss as far as S. & R. were concerned. As indicated above, no action was ever taken by either Don Sherwood, Bert Edwards or Bill Strong as far as directing foreclosure on Walker or the making of the loan. (R. Vol. 9, p. 2048)

After Donald Sherwood left for Europe Chamberlin determined to go ahead as far as he was able in the loan

negotiations. He employed an attorney to work out a merger of Walker Motors-Kennewick and Tri-City Rambler, Inc., so that all personnel could be put in one shop and overhead could be cut down. Discussions were also had with Palmer Walker and with his attorney, Bob Day in this connection. (R. Vol. 9, pp. 2048-2050)

During the merger and loan negotiations with Walker and his attorney, Bob Day, Chamberlin was advised that Walker had checks out to Volkswagen of Washington, his prime supplier, and needed cash to cover them. Chamberlin then loaned Walker $9,000.00 on his personal note for two reasons: (1) he wanted to keep the dealership afloat, and (2) he didn't want any adverse publicity in the period of negotiations. Also, it was Chamberlin's thinking that in the event Walla Walla did not authorize the loan, that the $9,000.00 individual loan just made, plus the $15,000.00 personal guarantee on the loan of July 31, 1959, would enable S. & R. to attach all of Walker's stock in the Volkswagen corporations, together with all of his personal assets, if it was determined to liquidate the account. (R. Vol. 9, pp. 2050-2051) The $9,000.00 loan was made on May 2, 1960, and appeared on the finance loan register. (Page 5, Defendant's Exhibit A-10)

On May 9th or 10th, 1960, Chamberlin contacted Bert Edwards by phone advising him that they had a serious dealer situation he wished to discuss. Chamberlin then

went to Walla Walla on May 11th, taking with him Exhibit A-20, which was a new compilation of the Walker deficiencies prepared by Denny Englund for Bob Chamberlin on May 5, 1960. Exhibit A-20 sets forth a total deficiency for all three Walker corporations of $107,-258.49, with units sold "out of trust" in the amount of $46,888.78. This exhibit called attention to Walla Walla of how badly the Walker Motors corporations had deteriorated since the Strong report of February 15, 1960. Mr. Edwards sent W. G. Strong to Kennewick on May 12, and while Strong was in Chamberlin's office, Chamberlin received a phone call from Walker that he, Walker, had $35,000.00 "which he had secured from friends on the avenue and that if they had any intentions of criminal prosecution, they could forget them because he, Walker, was able to pay off the out of trust transactions." Edwards agreed to come up to Kennewick on the next day, Friday, May 13, 1960, and meet with Walker. (R. Vol. 9, pp. 2056-2058)

(9)

WALKER SECURES A $35,000.00 CASHIER'S CHECK FROM THE SEATTLE-FIRST NATIONAL BANK, RICHLAND, WITHOUT SECURITY

This bizarre transaction of Palmer Walker was made with Robert Hodgson, assistant manager at the Bank on May 12th, 1960. Walker who had done business with the bank for some years, advised Hodgson that he was

scheduled to have a meeting that same day with a Volkswagen distributor out of Seattle. That there was a possible business deal pending and that it might involve his needing some funds. That he was not sure, but that he was going to need $35,000.00 to take to the meeting with him, and if the deal went through he would have need of a $35,000.00 term loan. Walker further told Hodgson that if the deal didn't go through, he would return the $35,000.00 the same day. In other words, Walker wanted to borrow the money either for a day or for a term. Hodgson decided to let him have the money based upon his story and their previous experience with him and even though the Bank had had many overdrafts on Walker's account. (Defendant'sExhibit A-18) Late in the afternoon the $35,000.00 check was returned and the note previously signed by Walker was paid off from the proceeds of the cashier's check. (R. Vol. 7, pp. 1526-1527)

On May 13, 1960, Mr. Edwards came to Kennewick and a meeting was held with Edwards, Walker and Chamberlin present. The $35,000.00 cashier's check was exhibited by Walker to both Chamberlin and Edwards with Walker stating that, "Now, here I have money so let's get off the criminal prosecution thinking and get down to loan negotiations." Walker did not hand the cashier's draft to either Edwards or Chamberlin and nothing was said by Walker as far as applying it to any Walker corporation indebtedness. (R. Vol. 9, pp. 2058-2059)

After the meeting with Walker, Edwards and Chamberlin went to lunch and at that time Edwards brought up the $9,000.00 loan made by Chamberlin to Walker. Chamberlin was advised that in view of his exceeding the lending authority, his signature was being removed as an authorized signator at all of S. & R. banks in the Tri-City area. That further this was being done as disciplinary action. Chamberlin then told Edwards that under these circumstances he didn't feel that he could effectively act as manager of S. & R.'s Tri-City Branches and tendered his resignation, which was accepted. (R. Vol. 9, pp. 2059-2060)

One of the many inexplicable things about the $35,000.00 cashier's check episode, above set forth, is the fact that both Robert Hodgson and Joseph Stricker testified definitely that the entire transaction took place on May 12, 1960, while Bert Edwards and Robert D. Chamberlin were equally positive that the check was exhibited to them on Friday, May 13, 1960.

On May 23, 1960, Austin Roberts and Bert Edwards, members of the executive committee, held a meeting in Walla Walla. Chamberlin's resignation was discussed and reviewed as well as the circumstances of the Walker Motor Co. loan and commitment authority. It was noted upon this date that S. & R. had no disagreement with Chamberlin. (Defendant's Exhibit A-21, Minutes of Exe-

cutive Committee Meeting of May 23, 1960, Appendix, page 2)

(10)

LOAN NEGOTIATIONS OF BERT EDWARDS ON BEHALF OF S. & R. WITH PALMER WALKER

After Chamberlin terminated his employment with S. & R., Bert Edwards, on behalf of S. & R., continued negotiations with Palmer Walker in regard to a loan to the Walker corporations by S. & R. Edwards knew from the deficiency statement shown him by Bob Chamberlin on May 11th (Defendant's Exhibit A-20) that the Walker corporations were out of trust approximately $50,000.00. He further knew that the total deficiency was $107,000.00 plus the $9,000.00 unsecured loan of May 2, or a total of $116,000.00.

Discussions were had upon both May 24, 1960, and May 31, 1960. Edwards also knew that the financial statements of the Walker corporations had gone down as far as Walker's net worth was concerned $140,000.00. (R. Vol. 7, pp. 1641-1646) Mr. Edwards in his conversations with Walker and Mr. Walker's attorney, Bob Day, indicated that as soon as they received Walker's financial statements they could determine more the details and further stated that: "If we have to doctor them up that way, we are not reluctant to consider that, of course." (R. Vol. 7, p. 1647)

Edwards further agreed that the merger of the two corporations in Kennewick would be a good thing because it would cut down overhead and permit Walker to consolidate his accounting and further concentrate his operation on one premises. No definite agreement was reached in either of these meetings the latter part of May. (R. Vol. 7, p. 1648)

(11)

OWNERSHIP OF TRI-CITY RAMBLER STOCK BY ROBERT D. CHAMBERLIN

Appellant's argumentative statement of the case presents only S. & R.'s view of the Tri-City Rambler stock transaction. The facts in regard to the stock are as follows:

Chamberlin was initially contacted in January of 1959 by Walker in regard to Walker's estate plan, with Walker requesting that Chamberlin act as Trustee in his estate. At that initial conversation Chamberlin agreed to act as Trustee. Walker had been in S. & R.'s office on some routine business and brought the matter up. Next the estate matter was discussed at Walker's place of business, at which time Walker stated that his attorney had worked out a plan whereby the managers of Walker's three corporations were to run the business and that Chamberlin was to be the trustee and have authority over these men and was also to be issued stock in the corporation. (R. Vol. 9, pp. 2061-2062) On July 15, 1959, at

Walker's office, a third conversation took place and Walker advised Chamberlin that he had gone over the entire situation with his attorney and his attorney had advised him that naming of the other directors on the trusteeship by name was not a satisfactory situation and that they would be named by position, namely, the managers of his corporations, but that Chamberlin was still to have stock in the Rambler Company and be the governing member on the trusteeship. Walker further told Chamberlin at this time that in the event of his death, the corporations were to be operated until such time as they could be liquidated and his wife paid the proceeds.

Chamberlin was further of the opinion that his having a stock ownership would be beneficial to S. & R., because it would give S. & R. first-hand knowledge of the estate. At this meeting Chamberlin received ten shares of non-voting stock of Tri-City Rambler. At no other time did he receive stock in any of the other Walker corporations. Chamberlin was also instructed that he had no authority whatsoever in Walker's affairs until such time as the trusteeship came into being. (R. Vol. 9, pp. 2062-2065)

During the first part of June, 1960, it was reported to Chamberlin that Walker had told Donald Sherwood and other members of the executive committee, that Chamberlin had an interest in the Tri-City Rambler. Chamberlin requested a meeting for the purpose of clarifying his position. This meeting was held on June 7, 1960. At

this meeting Chamberlin told Donald Sherwood, Cameron Sherwood, Bert Edwards, Bob Day and Palmer Walker, who were in attendance, the facts as above set forth in regard to the Tri-City Rambler stock. The following day on June 8, 1960, he forwarded the stock in question by mail to Robert S. Day, attorney for Palmer Walker, the letter of transmittal being (Plaintiff's Exhibit 73—Appendix, page 1) The letter of transmittal clearly states and sets forth Chamberlin's position in regard to the stock, namely that he did not request the stock, pay for it or accept the stock in any way for financial gain. That further he did not want, nor would he accept any payment for the stock.

S. & R., through the members of its executive committee, continued negotiations with Palmer Walker with reference to working out a loan of some type, and although an oral agreement was thought reached on June 30, 1960, the negotiations finally blew up, due to various demands that were being made by S. & R. for the control of Walker's businesses. (R. Vol. 8, pp. 1861-1863)

(12)

S. & R.'S KNOWLEDGE AS TO FALSITY OF WALKER'S FINANCIAL STATEMENTS

St. Paul does not controvert the statement in S. & R.'s opening brief as to Edwards' first actual knowledge of the falsity of the Walker corporation's financial statements.

It is true that Mr. Edwards testified that technically his first knowledge of the falsity of the statements was obtained on May 27, 1960, when he examined C.P.A. Tame's work sheet financial statement. Long before this, however, S. & R. was familiar with the Walker Corporation's financial problems by reason of, first, the Strong report of February 15, 1960 (Defendant's Exhibit A-19) as well as Chamberlin's conference with Edwards on May 11, 1960, alluded to when Chamberlin brought to Edwards' attention the deficiency balance and increased "out of trust" situation as shown by Denny Englund's report of May 5, 1960 (Defendant's Exhibit A-20).

Although S. & R. in its opening brief argues on page 29 that Chamberlin by reason of being furnished copies of Walker corporations' financial statements and in turn furnishing those copies to the Seattle First National Bank, necessarily knew that the statements were false in view of his knowledge as to previous "out of trust" transactions; this argument and inference is not true as Chamberlin testified flatly that he had no knowledge as to any false entries in the Walker corporations books during Chamberlin's employment by S. & R. He also had no knowledge as to the falsity of the Walker corporations' financial statements until late April or early May, 1960, when it was apparent that the statements were not the same as the earlier Walker corporation financial statement. (R. Vol. 9, pp. 2070-2074)

(13)

THE WILLIAMS TRANSACTIONS

The various dealings that the S. & R. Tri-City offices had with Donald K. Williams are good examples of careless and inept operations on the part of S. & R. employees in both the Tri-City area and Walla Walla. S. & R. - Kennewick started dealing with Williams in the fall of 1956 when Chamberlin approved a small line of credit of five cars or $500.00 for Williams. Williams, at that time, was a small used car dealer. Through inadvertence or a "goof" this small line of credit was allowed to balloon up to the extent of $22,000.00 or $23,000.00. It was brought about by various men in the S. & R. - Kennewick office, all handling the Williams' account without apparently realizing the limitations that had been placed upon the account. (R. Vol. 2, pp. 387-389) The status of the account was brought to Chamberlin's attention by Dean Dion and Dion was instructed to immediately liquidate the account down. This was done and Dion got the account down to somewhere between $5,000.00 or $6,000.00, using rather drastic but firm methods. (R. Vol. 2, pp. 389-390) Unfortunately, while S. & R. - Kennewick was liquidating the Williams' account down, Williams unknown to S. & R. - Kennewick was making additional flooring loans at S. & R. - Pasco. Dave Clancy was manager of S. & R. - Pasco, but exercised very little supervision over the loans made to Williams. Clancey was transferred to Walla Walla in

the late spring of 1958 and Chamberlin became general manager of S. & R.'s Tri-City offices on July 22nd, 1958. (R. Vol. 1, pp. 54-56; R. 20 Pretrial Order) Apparently no liaison existed between Chamberlin in Kennewick and Clancey in Pasco. Chamberlin first became aware of the fact that Williams had been securing loans from S. & R. Pasco during the summer of 1958, after he became general manager. He then instituted the same practice in the Pasco Office that had been undertaken in the Kennewick office as far as liquidating Williams down to a reasonable amount. The loans to Williams in the S. & R. - Kennewick office were made during this period of time by Chamberlin, Marshal, O'Herin, Dion and Turnquist (Defendant's Exhibit A-26) In S. & R. - Pasco the loans to Williams were made by Koster, Mirus and Kruger (Defendant's Exhibit A-27) After investigation showed the true status of the Williams' account in both offices, S. & R. took various security from Williams, including a quit claim deed (Defendant's Exhibit A-3) an additional quit claim deed (Defendant's Exhibit A-5. The equity on the first deed was about $3,500.00 and the equity on the second deed was $5,000.00 or $5,500.00 (R. Vol. 2, pp. 399-400)

The consolidation of the Williams' loan took place in November 1958, when the security above mentioned was taken. The efforts to liquidate the account had not proven too satisfactory so that in June of 1959 Williams' business was sold by S. & R. to one John L. Hale who executed a

note in the amount of $5,000.00 which was then credited to the Williams' account. Hale operated a used car lot under the name of Quality Motors and was still operating it at the time Chamberlin left S. & R.'s employ. (R. Vol. 2, pp. 401-402)

During the period that Williams was securing flooring loans from both S. & R. in Pasco and Kennewick, and during the period of his liquidation, he was required to sell S. & R. repossessions generally without receiving a commission. He also worked on S. & R. repossessed cars that needed repair. This saved S. & R. money and was a good "deal" for S. & R. (R. Vol. 1, pp. 208-209) On cars sold by Williams for S. & R. employees, Williams not only received the repair costs, if repairs were involved, but also a commission for selling the cars. (R. Vol. 3, pp. 560-561)

Encouragement of employee loans was an important factor bringing about the employee car sales. Prior to 1958 there was no particular policy with reference to employees purchasing repossessed automobiles with the exception that the repossessed automobile was first offered to the company, and if the company did not purchase the car, the employee was free to go ahead and purchase it. In addition to Chamberlin, Dion and Koster buying repossessed automobiles, Dave Clancey the manager at S. & R. - Pasco, purchased repossessions. (R. Vol. 2, p. 378)

In November, 1958, at a branch manager's meeting in Walla Walla, Chamberlin brought up the matter of employee loans and moved that the loans be discontinued, or, as an alternative, that all employee loans be funnelled through Walla Walla. Chamberlin's motion at the meeting died, securing only one vote in addition to Chamberlins. Prior to the vote on the motion, Donald Sherwood spoke upon the matter of employee loans, stating that the total volume was in the neighborhood of $180,000.00 to $200,000.00 and that it was profitable loan business. That if the employees had this much business to generate, that the Company should be entitled to that business and deal with them. At that time the interest charged on employee loans was 8% but thereafter it was raised to 12%. (R. Vol. 2, pp. 381-382)

A bizarre feature of the Williams Transaction was the successive flooring in June and July, 1958, of two different Chevrolets. This involved John Koster, Jerry O'Herin and Mirus. Dean Dion also handled some of the transactions with Williams. The evidence does not indicate whether the loans were made on invoice or certificate of title. (R. Vol. 6, p. 1445) (R. Vol. 9, pp. 1972-1976) The motor numbers of the Chevrolets was not checked as they were brought in and re-floored, after having been paid off. (R. Vol. 9, p. 1973) It was out of this repeated flooring of the two Chevrolets that Williams passed several N.S.F. checks.

Although S. & R. called Williams as a witness, they did not inquire of him about the successive flooring transactions upon these two Chevrolets.

(14)

THE NICHOLSON CAR DEAL

The first car involved in this transaction was a 1957 Plymouth which was driven out from the factory for Chamberlin and then placed upon Williams' lot for sale. Williams sold the Plymouth to one Jessee who financed the car through S. & R. The proceeds of the loan Jessee made with S. & R. were applied to Chamberlin's account by which he originally financed the Plymouth. Jessee traded in a 1956 Austin on the Plymouth which at the time of the trade-in was incumbered at the National Bank of Commerce in Kennewick. This loan was paid off to the National Bank of Commerce by Chamberlin. Chamberlin drove the Austin as his personal car for some six or seven months. (R. Vol. 2, pp. 411-418)

Jerry F. O'Herin, employed by S. & R. - Kennewick from 1956 through the middle of 1959 as a small loan man, handled the transaction with Nicholson. Nicholson came into the Fairway Finance Office of Kennewick in November of 1957, having had a small loan balance with that office for some time. He had also another Fairway Finance loan at the Pendleton Office and wanted to consolidate the two loans, and obtain more money to purchase

an automobile. O'Herin suggested that Nicholson go to Pendleton and endeavor to make the loan there, as the Pendleton office had the largest balance. (R. Vol. 8, pp. 1792-1795)

Previous to this time, Chamberlin had been in correspondence with the Pendleton office of Fairway Finance attempting to work out a consolidation of Mr. Nicholson's loans between the two offices. Apparently this was unknown to O'Herin when he talked with Nicholson in November, 1957. Pendleton refused to consolidate the loans and O'Herin then went ahead with a consolidation of the loan in the Kennewick office. At this time Nicholson advised O'Herin that he wished to buy a car and O'Herin then asked Chamberlin if he was interested in selling his 1957 Simca. Chamberlin agreed to sell it and O'Herin proceeded with the handling of the transaction. A new consolidate loan was then made to Nicholson, paying off Pendleton, in the total amount of $3,923.28, as set forth on page 34 of appellant's brief. The purchase price of the Simca paid to Chamberlin was $1,740.62. It will also be noted that finance charges for this loan amounted to $771.16. As security for this loan, O'Herin chattel mortgaged the 1957 Simca, a 1951 Buick, an electric calculator, electric typewriter, television set, radio and a number of household items of furniture, together with a wage assignment. (R. Vol. 8, p. 1797)

On November 18, 1957, Nicholson paid $600.00 on the account. Shortly thereafter Nicholson returned the Simca to the office and an $1,800.00 credit was given him for the return of the automobile. (R. Vol. 8, pp. 1799-1800) There was a rebate to Nicholson of $454.21 of finance charges. This left $316.95 finance charges still a part of the loan. Although the rebate charges of $454.21 were credited to Nicholson's loan, the check was written directly to Fairway Finance-Kennewick, covering this item in accordance with the bookkeeping practices of S. & R. (Plaintiff's Exhibit 35) After the various credits of $600.00, $1,800.00 and $454.21 given Nicholson, this left a balance due on the original loan of $3,923.28, of $1,069.07. This was rewritten again in a new loan, the new loan being in the total amount of $1,831.92. The new loan was rewritten on February 27, 1958, or thereabouts. (Plaintiff's Exhibit 31) A breakdown of the new loan is shown on page 35 of appellant's brief, being the original balance of $1,069.07, additional cash by check to Gene Nicholson of $430.93, new finance charges of $244.91 and insurance item of $87.01.

Considering the previous finance charges of $316.95 which were still a part of this re-write, and the new finance charges of $244.91, S. & R. was to receive $561.86 finance charges on the loan of $1831.92. Chamberlin did not receive any moneys out of the Nicholson transaction with the exception of the original $1740.62 paid him out of the

first Nicholson loan. (R. Vol. 8, p. 1806) The 1957 Simca returned to S. & R. by Nicholson was then traded by Chamberlin to Walker Motors, together with Chamberlin's Austin for an MG. Chamberlin used this method of disposing of the Simca for S. & R. S. & R. was paid the value of the Simca that Chamberlin received on the trade-in of $1300.00 (R. Vol. 2, p. 426). Chamberlin paid the $1300.00 to S. & R. by making a loan with S. & R. on his MG.

Nicholson thereafter left the State of Washington and was adjudged a bankrupt in the State of Minnesota. (Plaintiff's Exhibit 28)

(15)

CHAMBERLIN'S CAR TRANSACTIONS

In 1958 Chamberlin received an inquiry from the Securities Acceptance Corporation regarding an automobile that this company had financed and which they wished repossessed. The automobile was picked up by Chamberlin and he secured bids from the various automobile dealers. The bids were forwarded to Securities Acceptance Corporation and they accepted the highest bid. Chamberlin then sent them a check of S. & R. which was charged to the Suspense Account and dated January 31, 1958. The car was placed on the Don Williams used car lot for sale. On March 6, 1958, a loan file was set up. Chamberlin did not pay S. & R. the 12% interest for the per-

iod of somewhat more than thirty days due to the fact that he was not in S. & R.'s office a great deal during this period of time. He was travelling a great deal, setting up trailer financing in Idaho and Eastern Washington. He testified he did not have any intent to defraud S. & R. of the 12% interest. (Vol. 2, p. 432) The Suspense Account check was in the amount of $1250.00.

The Mercury automobile was sold by Donald K. Williams on behalf of Chamberlin for $1525.87 plus a 1952 Hudson taken in as a trade-in. The sale of the Mercury by Williams was financed through S. & R. and apparently paid out without incident. The proceeds of the Mercury sale were credited to Chamberlin's loan account with S. & R.

The 1952 Hudson was sold to a Mr. Livingston for $325.00 by an S. & R. check being made payable to Mr. Livingston and then endorsed by him and redeposited in the S. & R. bank account. Some of the $325.00 apparently was paid to Mr. Williams and the balance to Chamberlin. (R. Vol. 2, p. 328) The car was repossessed from Livingston and then sold again to Clifton E. Blackburn. Blackburn was unhappy with the car and returned it and was repaid the purchase price. The $25.00 received by Chamberlin out of the re-sale of the Hudson was the difference between the Livingston purchase price and the Blackburn purchase price. (R. Vol. 2, p. 433)

As has been set forth, *supra,* employee loans were encouraged and there was no announced policy prohibiting employees from buying and selling repossessed automobiles. It was generally understood to be permissible. (R. Vol. 1, p. 58; pp. 187-189; pp. 206-207) The usual interest was charged employees on these transactions. (R. Vol. 1, p. 207) It was customary on all individual loans such as S. & R. financing an employee-owned car sold to a member of the public, for S. & R. to accept the paper without recourse to the employee former owner in the event the financing went bad in the same manner as a member of the public bringing in a car to be financed. (R. Vol. 8, pp. 1890-1892)

(16)

THE KILTHAU LOAN

This loan involves John Koster, while manager of S. & R.-Richland. Koster was asked by Federal Discount Corporation, an out of state finance company, to contact a borrower who was delinquent, the borrower being a soldier stationed at Camp Hanford, near Richland. Koster worked the account unsuccessfully and finally had to repossess the automobile, it being a 1956 Oldsmobile. Koster then got bids on the automobile from automobile dealers with the high bid being $925.00. Federal Discount accepted the high bid and Koster determined to purchase the car himself. These transactions took place in March

of 1958. Koster drove the automobile for a short while and was approached by Mr. Kilthau on purchasing the automobile. Kilthau was recommended to Koster by Dick Thrap, an office manager of a construction firm in the Tri-City area. Koster sought a credit report on Kilthau but could get no information on him. The car was sold for $1350.00 plus the finance charges, which brought the total contract up to $1640.00, the finance charges being at the simple interest rate of 12%. Of the $1350.00 purchase price, $925.00 of it was payable to the Federal Discount Corporation and the remaining $425.00 belonged to Koster, he having purchased the repossessed automobile. However, the check for $425.00 was made out to John Kilthau. Kilthau had previously signed all of the loan papers and when the checks were issued to complete the deal, Koster was unable to get hold of Kilthau and so signed John Kilthau's name. Koster admitted that this was wrong but stated, as was the fact, that the $425.00 involved actually belonged to him and not to Kilthau. If Kilthau had endorsed the check, he would immediately have had to negotiate it to Koster to pay for the automobile. (R. Vol. 1, pp. 43-50)

As stated, *supra*, the jury after hearing the conflicting evidence on the many transactions, found no dishonesty or fraud on the part of the four principals and so answered the interrogatories.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

Appellant S. & R. in its specifications of error 1, 2 and 3, put in issue on this appeal the trial court's action in denying appellant's motion for a directed verdict and post trial motions. Questions thus raised should be restated in view of the fact that the case was submitted to a jury and a verdict favorable to the appellee rendered. The questions upon these specifications of error thus become:

(1) Was there any evidence or reasonable inferences from the evidence making the claim of fraud and dishonesty upon the part of the principals under the bond a question of fact for the jury?

(2) Is there any evidence or reasonable inference from that evidence substantiating the verdict of the jury finding the principals under the bond not guilty of fraud or dishonesty?

The remaining questions involving instructions to the jury and admissibility of evidence will be answered in the form set forth by the appellant S. & R.

SUMMARY OF ARGUMENT

1. The evidence clearly presented a question of fact for the jury and fully supported the verdict of the jury, finding the principals under the bond not guilty of fraud or dishonesty.

Interpretation of the bond, limits its coverage to fraud and dishonest acts and cannot be extended to include negligence, incompetence, carelessness, mismanagement or losses from bad debts.

2. The instructions of the court were correct and appellant's proposed instruction number 31 was properly refused.

Dishonest and fraudulent conduct cannot be extended to include a reckless, willful and wanton disregard for the interests of the employer.

3. The court properly exercised its discretion in refusing to strike the testimony of Robert Day relating to S. & R.'s loan negotiations with Walker.

The court was further correct in its discretionary ruling excluding the statement of Rivon Jones, representative of St. Paul, as to a certain admission attributed to Jones, which was in any event nothing more than Jones' opinion and was not a statement of fact.

ARGUMENT IN ANSWER TO APPELLANT

Before embarking upon an examination into the facts answering S. & R.'s argument that Chamberlin and Koster were dishonest as a matter of law, we should have in mind some of the fundamental principles involved in the review of a jury's verdict.

"The propriety of granting or denying a motion for a directed verdict is tested both in the trial court and on appeal by the same rule. The trial court must view the evidence and all inferences most favorable to the party against whom the motion is made. The reviewing court must do the same with respect to a judgment entered on a directed verdict or the denial of a motion for a directed verdict or a judgment entered notwithstanding the verdict. The decisions are many and the rule is the same both on appeal, and on the hearing of the motion in the trial court."

Vol. 2B, Barron & Holtzoff, Section 1075, page 378.

Schnee v. Southern Pac. Co., (C.A. 9, 1951) 186 F. 2d 745.

Graham v. Atchison Topeka & Sante Fe Ry. Co., (C.A. 9, 1949) 176 F. 2d 819.

In *Lavender v. Kurn (1946) 327 U. S., 645; 90 L. Ed. 916,* the United States Supreme Court stated in regard to the function of an appellate court in reviewing the verdict of the jury, that *(page 653 of U.S., and 923 of L. Ed.):*

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to

> discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In reinstating the jury's verdict the Supreme Court further stated:

> "The jury having made that inference, the respondents were not free to re-litigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

The rule has long been in the State of Washington that in appeals from judgments entered upon verdicts of a jury the Supreme Court will review the evidence most favorable to the successful parties and all such material evidence must be accepted as true. That further the verdicts must stand unless as a matter of law, there is neither evidence nor reasonable inferences therefrom to sustain the verdicts.

> *Wines v. Engineers Limited Pipeline Co., 51 Wash. (2d) 487, 319 Pac. (2d) 563.*

> *Gildesgard v. Pacific Warehouse Co., 55 Wash. (2d) 870; 350 Pac. (2d) 1016.*

THE EVIDENCE AMPLY SUPPORTS THE FINDING OF THE JURY THAT CHAMBERLIN AND KOSTER WERE NEITHER DISHONEST NOR FRAUDULENT

While it is true that for the obligee to recover upon a fidelity bond such as is involved in the case at bar, there need not be such an act as would support a criminal conviction, nevertheless, there must be a showing made of a dishonest or fraudulent act. A surety indemnifying the obligee for the dishonest or fraudulent acts of the principals under the bond, is not, however, liable for negligence, incompetence, unwarranted extension of credit, losses from mismanagement, the use of poor business judgment or for mere debts arising out of such acts.

In *Parker Lumber and Box Company v. Aetna Casualty and Surety Company (1926) 140 Wash. 262; 248 Pac. 795*, the Washington Supreme Court stated at page 267 that:

> "It has also been held that such bonds are liable for loss resulting from fraudulent or dishonest acts of the employee, but are not liable for mere debts or losses resulting from mismanagement or the use of poor business judgment by the employee.
>
> *Monongahela Coal Co., vs. Fidelity & Deposit Co. of Maryland, 94 Fed. 732.*
>
> *Williams vs. United States Fidelity & Guaranty Co., 105 M.D. 490, 66 Atl. 495.*"

In defining the liability of a surety for the acts of

principals under the bond it is stated in *45 C.J.S.-Insurance, Section 802, page 853*, as follows:

> "Hence, except as to acts which are in violation of statute or express rule, or which in themselves constitute the misconduct insured against, liability is not imposed on insurer for the consequences of acts done in actual good faith, without intentional fault, including constructively or technically fraudulent acts innocently done, even though they constitute a breach of obligation by the person whose fidelity is insured to the beneficiary, nor is the insurer liable for a loss occasioned through mere negligence, or carelessness, nor is the insurer liable for a loss through inattention to business, mismanagement, mistake, bad judgment, incompetency, or other acts or omissions not fraudulent or dishonest."

World Exchange Bank vs. Commercial Casualty Ins. Co., 255 N. Y. 1, 173 N. E. 902, supports the view that the question of an employee's fraud or dishonesty is one properly submitted to a jury. Therein the trial court had ruled the employee's conduct "Dishonest" as a matter of law and thereafter had granted a new trial. The appellate court in affirming the order granting a new trial and holding that it was a jury question, stated, speaking through Justice Cardozo at page 903:

> "We think the quality of the act is not so obvious and determinate as to exclude opposing inferences. (Citing cases) Criminal the act was not, unless done with criminal intent (Citing cases). The presence of that intent is not, in the setting of these circumstances, an inference of law. The question is perhaps closer whether the act within the meaning of the policy must be said to be 'dishonest', for dishonesty within such

> a contract may be something short of criminality. (Citing cases). (Then follows the statement set forth on page 51 of appellant's brief) * * * * * If this standard is to govern, we think the quality of the teller's act is for the triers of the facts. *The act was a wrongful one, very likely a technical conversion, certainly a departure from instructions, but in the common speech of men there would be reluctance to describe it as flagitious or dishonest.*" (Emphasis added)

With the above principles in mind, considering the fact that the evidence in the case at bar is highly conflicting throughout, the acts of the principals, Chamberlin and Koster viewed in the most favorable light under the evidence, clearly were neither dishonest nor fraudulent, and involved properly questions of fact for the jury.

On page 52 of appellant's brief it is charged that throughout the entire period of his employment Chamberlin consistently withheld material facts from his employer. This, of course, is not true. All of the loans that were made to the Walker corporations were routinely reported on the monthly finance loan register. (Defendant's Exhibit A-10) However, as we have previously pointed out, no one in executive authority in Sherwood & Roberts Inc. in Walla Walla bothered to look over the monthly finance loan registers to see what loans were being processed at the branches. (R. Vol. 5, p. 1224) In judging Chamberlin's acts the jury was certainly entitled to consider the fact that the Sherwood & Roberts Branch organizations were decentralized and managers such as Robert D. Chamberlin

were completely self-sufficient, with each manager in complete authority as to the area he served. (R. Vol. 5, pp. 1128-1129, testimony of Donald Sherwood) A manager having such complete authority is certainly not to be burdened with the obligation of reporting every problem to the executives in Walla Walla. The jury was fully justified in concluding that Chamberlin had the authority to proceed in the handling of the Walker corporation consolidated loans, using his best judgment.

Appellant asserts that Chamberlin should have advised as follows:

(1) That Walker was "out of trust" in 1958 and 1959.

It was neither necessary nor required as far as Chamberlin was concerned, to report the situation of Walker being "out of trust" in 1958 as this matter was taken care of by the loan consolidation of November 19, 1958 when both the European Motors and Walker Motors-Kennewick loans were collateralized by Chamberlin in using his best business judgment. (R. Vol. 9, pp. 2005-2007) The evidence is far from clear that the Walker corporations were "out of trust" in 1959 due to the mix-up at the American Motor Company's distributing office when cars were shipped without invoices and invoices were sent without cars. (R. Vol. 4, 877-878; R. Vol. 9, pp. 2033-2034)

(2) The full extent of Walker's "out of trust" sale of mortgaged cars in 1960 was revealed by Chamberlin to the

best of his knowledge. In assisting W. G. Strong prepare his report of February 15, 1960, Chamberlin gathered the information on units sold "out of trust", using the figures of Denny Englund as secured on all Walker Motors corporations. (R. Vol. 9, p. 2041) There is no proof whatsoever that Chamberlin knew more units had been sold without being paid for than was contained in the Strong report at the time it was made. Denny Englund further prepared the report for Chamberlin on May 5, 1960, (Defendant's Exhibit A-20) which Chamberlin used in his discussion with Bert Edwards in Walla Walla on May 11th, pointing out to Edwards the seriousness of the situation. (R. Vol. 9, pp. 2056-2058)

(3) The fact that Chamberlin made loans totalling more than $35,000.00 in November 1958, as pointed out *supra* was an exercise of Chamberlin's best business judgment in collateralizing the indebtedness of the Walker corporations arising out of the sale of units without paying for them. Chamberlin's actions were done entirely for the benefit and protection of S. & R., and were not done for the purpose of covering up anything. As a matter of fact, Bert Edwards in his loan merger and consolidation talks directly with Palmer Walker in the latter part of May, 1960, was attempting to do the same thing, only he was dealing with a much larger sum than $35,000.00.

(5) It is asserted that Chamberlin should have re-

ported the alleged "kiting" of checks between Chamberlin and Walker. The book overdraft situation was, of course, self-evident to Walla Walla at all times by reason of the daily cash reports, if Walla Walla had bothered to examine the daily cash reports. (R. Vol. 7, pp. 1651-1652) The shortage of funds was brought about by Walla Walla not forwarding sufficient moneys to Chamberlin to take care of the business already committed. The book overdraft situation was known to Walla Walla, however, and Donald Sherwood did not forbid Chamberlin to continue the practice but merely advised him that if he was caught in a bank overdraft, he would be "standing alone". (R. Vol. 9, pp. 2019-2020)

(6) Chamberlin's ownership of stock in the Tri-City Rambler has been fully explained in appellee's counterstatement of the case *supra* (page 27). The stock was accepted in good faith by Chamberlin so that he could assist, if necessary, in the management of Walker's estate. (R. Vol. 9, pp. 2061-2062)

(7 & 8) Complaint is further made on failure to notify Walla Walla of the reduction in the personal guaranty of Walker by $32,000.00 as a result of the loan consolidation of July 31, 1959, and the further release of Walker Motors - Kennewick of obligations by reason of this loan consolidation. Appellant completely overlooks the testimony with reference to the need for eliminating Walker Motors - Kennewick as a flooring account. The

matter was taken up with W. G. Strong by Chamberlin and it was agreed that Walker Motors - Kennewick would be so eliminated. To do this, it, of course, was necessary to release Walker Motors - Kennewick as far as its collateral security was concerned to enable Walker Motors-Kennewick to seek flooring elsewhere. This was self-evident. As has been emphasized before, the consolidated loan was reported on the monthly loan register (Defendant's Exhibit A-10) and further facts could have been had by Walla Walla for the asking.

It must be remembered further in considering the charge of the appellant as to lack of notice of certain transactions to Walla Walla, that a manual of procedure did not exist in the entire S. & R. organization, as Mr. Donald Sherwood did not believe in them. (R. Vol. 5, p. 1224) Consequently the managers had to proceed in all instances using their best business judgment and clearly no requirement ever existed to notify Walla Walla other than the usual business routine forms that were in all instances complied with.

(9) The $15,000.00 unsecured loan made in December, 1958, was made to Palmer Walker personally for a legitimate reason, namely, to acquire and purchase Rambler parts, equipment and accessories. (R. Vol. 5, pp. 1037-1038) This loan did appear on the loan register and within six weeks thereafter approximately $11,000.00 had been repaid upon the loan. The previous "out of trust"

transactions that were consolidated in November, 1958, had no relationship to this loan.

(10) The $9,000.00 personal unsecured loan made to Palmer Walker on May 2, 1960, was made by Chamberlin for the purpose of preventing the Walker corporations from having N.S.F. checks outstanding. The loan did appear upon the finance loan register and in any event was known to Bert Edwards shortly after it was made. The making of this loan at most indicated only a lack of good business judgment upon Chamberlin's part. No necessity existed to specially notify Walla Walla of the transaction.

(11) The Donald Williams consoldated loan on November 20, 1958, again represents a loan transaction that improved the position of S. & R. by taking of security from Williams for the delinquent flooring loans and N.S.F. checks. There again was nothing about this loan that required special notification to Walla Walla and it, as did all other loans, appeared on the monthly finance loan register.

(12) Complaint is made of Chamberlin borrowing money from S. & R. and engaging in buying and selling certain automobiles that were his personal cars. Employee personal loans were desired by S. & R. (R. Vol. 2, pp. 381-382) and it was customary for employees to buy repossessed automobiles, provided it was not determined

that S. & R. would keep the repossessed automobile for resale. (R. Vol. 2, p. 378) The failure of S. & R. by either directive or incorporating employee rules in a manual of procedure prohibiting both employee loans and the purchase and sale of repossessions, actually was the primary cause of the employee car transactions. S. & R. could have stopped it if they desired. There, of course, was an eagerness to benefit from the interest paid by the employees that motivated S. & R. to permit the employee loans.

(13) The use of S. & R. money by means of the Suspense account for a period of a month due to the Securities Acceptance Corporation transaction by Chamberlin, arose out of inadvertence by Chamberlin's travelling away from the office a great deal. This was a mere oversight that could occur in any office. (R. Vol. 2, p. 432)

(14) The Nicholson and Simca deal, as the counterstatement of the case set forth by the appellee indicates, has two entirely different and conflicting versions. Appellant refuses to accept any version but its own, which, of course, the jury chose not to believe. This was a disputed question of fact and under Jerry F. O'Herin's testimony (R. Vol. 8, p. 1806) Chamberlin received nothing except the original purchase price of the car of $1740.62. The claimed double payment sought to be established by the appellant was apparently given no weight by the jury.

(15) The use of the suspense account by employees was a bookkeeping procedure that was employed by the S. & R. office in Kennewick. It did not involve any dishonesty or fraudulent purpose as far as the employees were concerned but was merely a method of initiating a loan. No directives have been pointed out by S. & R. indicating that this was an improper procedure or likewise that it resulted in any loss to S. & R. If this procedure was not desired by Walla Walla, it should have been changed by either Mr. Strong or Mr. Priest during their routine audits of the Kennewick operations.

Citation is made by appellant of *Nailor vs. Western Mortgage Co., 54 Wash. (2d) 151; 338 Pac. (2d) 737*, upon the point that misrepresentation of the financial condition of third persons has been held to be fraud. In the Nailor case we have a direct misrepresentation by a mortgage company to a supplier that the mortgage company's contractor was of good financial stability. The case is obviously not in point with the situation in the case at bar. Chamberlin made no representations to S. & R., but as S. & R.'s manager exercised his own business judgment in making the loans in question. As a manager, these decisions were his to make and there was no requirement that he run to Walla Walla with every loan problem.

The case of *Hanson vs. American Bonding Co., 183 Wash. 390; 48 Pac. (2d) 653*, is also cited by appellant as being applicable. The principal under the bond in the

Hanson case was a bank employee that had been convicted of an intentional violation of the banking act by a jury. Upon his later trial to the court upon the bond, the trial court agreed with the jury that under the facts the employee had been dishonest. This case in no way changes the Washington rule that a bonding company is not liable for losses arising from mismanagement or the use of poor business judgment by the employee-principal.

Parker Lumber & Box Company vs. Aetna Casualty and Surety Co. (supra) p. 46.

Commencing on page 56 of appellant's brief, repetitious claims are again made of allegedly dishonest acts upon the part of Chamberlin. It is asserted that the alleged check "kiting" permitted Chamberlin to conceal his own overdrafts and critical financial plight of the Walker Companies in the month end reports to Walla Walla. This, it is submitted, is pure fiction as the daily cash report forwarded to Walla Walla and testified about in detail by Dennis C. Hayden, the accountant for all S. & R.'s Tri-City offices, (R. Vol. 7, pp. 1651-1652) clearly proves that Walla Walla, if they read the daily cash reports, was fully apprised of the situation at all times. Bert Edwards knew of the book overdraft situation in the Kennewick office, as did also Donald Sherwood. (R. Vol. 9, pp. 2019-2020) No deception whatsoever was involved in the exchange of checks with the Walker corporations.

Complaint is made by S. & R., in its brief, of Chamberlin's recommendation of Walker to the American Motor Company. No showing whatsoever has been made by S. & R. that the statement: "Mr. Walker's business practices have been beyond reproach", in any way caused S. & R. a financial loss. The statement was made by Chamberlin for the purpose of assisting Walker Motors to secure the Rambler Franchise, and was further made after consideration of the excellent consumer paper that S. & R. had received from the Walker corporation. (R. Vol. 4, p. 827)

Appellant claims that since Chamberlin knew that Walker sent a financial statement to American Motors in December of 1958, that he also must have known that the statement was false. Chamberlin testified that he had never seen the statement in question prior to the trial. (Plaintiff's Exhibit 68-A) (R. Vol. 9, p. 2014) The appellant's theory was, of course, argued to the jury but the jury refused to accept it.

Complaint is made as to Chamberlin's conference with Mr. Donald Sherwood in the latter part of January, 1959, regarding the drafting instructions with the American Motor Company. It will be remembered that the American Motor Company would not accept S. & R. as a finance Company but insisted that the sight drafts be presented either to a national finance company or a bank. The committment to Tri-City Rambler had already been

made by Chamberlin and the only thing that remained to be settled was the guaranty to the Seattle-First National Bank. When Chamberlin had the conference with Sherwood, he did not ask for authority on the flooring commitment. (R. Vol. 9, p. 2018) The Walker situation as far as the previous "out of trust" transactions were concerned, was a closed book, Chamberlin having collateralized the loan, and there was no requirement upon Chamberlin to go over past history with Donald Sherwood. What Sherwood would have done if he had all of the facts, of course, is speculation. The testimony is in direct conflict as to what was discussed at the conference between Chamberlin and Sherwood in Walla Walla and the jury determined not to follow S. & R.'s theory of the evidence.

The July 31, 1959, loan consolidation, as has been emphasized *supra*, was made for the primary purpose of accommodating the tight money situation as far as S. & R.-Kennewick was concerned. The making of the loan and the release of Walker Motors-Kennewick as a dealer requiring heavy flooring commitments, permitted S. & R. in Kennewick to return to Walla Walla approximately $125,000.00 within the next 90 days. (R. Vol. 9, p. 2033; R. Vol. 7, p. 1653) There was no proof whatsoever that this transaction was intended as a further "cover-up" of the prior consolidation in November, 1958. It is asserted that Walker's personal guaranty was virtually eliminated. This,

of course, is not true as the loan of $47,716.90 was personally guaranteed by Palmer Walker in the sum of $15,000.00. (R. Vol. 9, pp. 2027-2028) Chamberlin in making this loan further determined that the total valuation of all the security was $61,313.25. (Plaintiff's Exhibit 58) There is no doubt that this loan was adequately secured. What brought about the very substantial loss was the refusal of Walla Walla to take action when action was required. The Strong report of February 15, 1960, emphasized clearly the desperate need for immediate action in regard to either closing out or refinancing the Walker corporations. Donald Sherwood left for Europe in April of 1960, and the subordinates under him let the situation steadily deteriorate until the deficiency reached over $107,000.00 as shown by Exhibit A-20. The vacillation of Walla Walla greatly increased the extent of the loss.

The argument is made that collusive misrepresentations arose out of the Chamberlin-Walker transactions. It is difficult to understand how such a contention can be made in view of the fact that all loans appeared on the loan register (Defendant's Exhibit A-10); that further W. G. Strong was notified as early as the spring of 1959 of the fact that Walker Motors had been selling cars in the previous year without paying for them and the further fact that Strong was furnished the information by Chamberlin of "out of trust" transactions for Strong's report of February 15, 1960. These acts are certainly not those of

a person seeking to conceal the situation from his superiors. Chamberlin's stock transaction has been fully explained and the jury obviously accepted Chamberlin's testimony in regard to it.

Chamberlin, in his capacity as manager for S. & R.'s corporations in the Tri-City Area, was in a fiduciary capacity and perhaps S. & R. had a civil action for negligence or perhaps mismanagement against Chamberlin. However, they do not have a cause of action for fraud or dishonesty that can be maintained. This entire case factually is based on conflicting evidence presenting a series of questions of fact for the jury's determination. The jury has made such a determination and its finding is conclusive and binding upon the appellants herein, with the evidence fully supporting the jury's verdict.

INTERPRETATION OF THE BOND

Appellant points out that a bond, such as before the court in the instant case, is to be broadly construed and protects an employer against the wrongful acts of an employee, even though not criminal. Appellee generally has no quarrel with the theory of broad construction on coverage or, as it is often stated in the converse, strict construction against the bonding company, but nevertheless wishes to emphasize that broad construction does not mean a re-writing of the bond.

St. Paul protected S. & R. under the bond against

dishonest or fraudulent acts of the principals. The bond is not an errors and omissions policy covering negligent or careless acts of the principals as appellant seems to contend. It is a fidelity bond protecting the obligee from loss by the intentionally dishonest or fraudulent acts of the principals.

In *Brown vs. Underwriters at Lloyd's, 53 Wash. (2d) 142; 332 Pac. (2d) 228,* the Washington Supreme Court stated as follows:

> "Over a hundred years ago, the supreme court of North Carolina in Tilghman v. West, 43 N.C. 183, 184, declared:
>
> '". . . Fraud cannot exist, as a matter of fact, where the intent to deceive does not exist: for it is emphatically the action of the mind which gives it existence . . .'"
>
> "Black's Law Dictionary (4th Ed.) 788, 789, says of fraud:
>
> '"It (fraud) consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional . . .'"

In the *Brown* case, supra, the court was considering an errors and omissions policy that excluded dishonesty and fraudulent acts. In further considering whether or not the acts in question were excluded under the policy the court stated:

"It cannot be over emphasized that we are here dealing with an exclusionary clause which excepts from coverage losses 'brought about or contributed to by the dishonest, fraudulent, criminal or malicious act or omission of the assured or any employee of the assured . . .'

"Fraud in this connection must embrace dishonesty."

In *Dunlap v. Seattle National Bank, 93 Wash. 568; 161 Pac. 364,* the Washington court said:

". . . If when all of the facts and circumstances are taken together they are consistent with an honest intent, proof of fraud is wanting."

In *Irvin Jacobs & Co. vs. F. & Deposit Co. of Md., (C.A. 7) 202 Fed. (2d) 794; 37 A.L.R. (2d) 889 (1953),* quoted with approval in the *Brown* case, supra, the court of appeals for the 7th circuit stated:

". . . However, mere negligence, mistake or error in judgment would not ordinarily be considered a dishonest act. Acts resulting from incompetence cannot be characterized as dishonest."

In the cases cited by appellant, particularly *Mortgage Corporation of N. J. vs. Aetna Casualty & Surety Company, 115 A. (2d) 43; United States Fidelity & Guaranty Company vs. Egg Shippers S. & F. Co. (C.A. 8) 148 F. 353;* and *Md. Casualty Co. vs. American Trust Co. (C.A. 5) 71 F. (2d) 137,* there is no support for the contention that the dishonest or fraudulent act must not necessarily be an intentional act.

In the New Jersey case the court was dealing with admitted derelictions intentionally done and so stated in the following language:

> "It seems to us that in the instant matter we likewise could not properly stand by and permit the jury finding that the *admitted* derelictions of Harrison were not dishonest within the bond coverage. *We are not dealing with an instance of neglect, mistake or incompetence; nor are we dealing with an isolated inadvertent or insignificant delinquency by an employee. What Harrison did was done wilfully and was done over a period of four months.*" (Emphasis added)

In the *United States Fidelity & Guaranty Company* case the employee, as is pointed out in the citation quoted by the appellant on page 63: "was wilfully, intentionally and grossly faithless'.

In the *Maryland Casualty Company* decision the Bonding Company did not make any claim that the loss was brought about by the employee's negligence, error in business judgment or carelessness. A conspiracy was therein involved whereby the Bank president conspired with others "admittedly known to him to be insolvent" and made loans to such insolvent persons with the intention that they buy stocks which would then be jointly owned with the Bank president.

Proof of intent on the part of the principals, under the bond, to defraud S. & R. or to be dishonest in their employment by S. & R. was clearly lacking under the facts

and the jury was fully justified under the evidence in answering the interrogatories the way they did. The court likewise in view of the evidence properly submitted the case to the jury and there existed no basis either under the law or the facts to reverse the verdict of the jury.

THE NICHOLSON CAR TRANSACTION

This transaction has already been discussed twice by appellee in its brief and we do not intend to belabor the issue. As previously pointed out, the jury fully considered this transaction under the evidence and determined it adversely to the appellant. The evidence was conflicting and the jury chose to follow Jerry F. O'Herin's testimony rather than accept as the facts the bookkeeping advanced on behalf of the appellant. It must also be remembered that this rather complicated transaction took place 4½ years before the trial and it is understandable the difficulty witnesses had in remembering all of the precise details.

Appellee does wish to point out that O'Herin acting on his own gave Nicholson an $1,800.00 credit when Nicholson returned the Simca. It later developed that Chamberlin in his effort to realize on the car for S. & R. was only able to secure $1,300.00 and this by way of the trade-in method. The error in giving Nicholson too great a credit was not Chamberlin's but was O'Herin's. The fact that the Nicholson car transaction turned out to be a loss

for S. & R. cannot be used as a basis, as appellant is seeking to do, for the charge of dishonesty and fraud leveled against Chamberlin. The type of customers that S. & R. necessarily dealt with, due to the extremely high rates of interest, (as compared to commercial bank rates) necessarily invited risks of poor loans. (R. Vol. 2, pp. 439-442) The stable individual borrower or automobile dealer with good financial backing would obviously not deal with S. & R. and pay 12% interest when he or it could secure financing at a much lower rate from commercial banks.

Appellant continuously makes the charge of dishonesty and fraud but points to no undisputed evidence supporting such charges. It had its day in court and the jury simply did not believe or accept appellant's theory of the case.

Koster's endorsing of the check to Kilthau, while technically wrong, was not fraudulent or dishonest. It caused S. & R. no loss whatsoever; as we have previously pointed out, the money involved in the check actually belonging to Koster in any event.

The trial court's refusal to grant appellant's motion for a directed verdict and post trial motions was correct.

THE INSTRUCTIONS AS GIVEN WERE CORRECT AND THE TRIAL COURT PROPERLY REFUSED PLAINTIFF'S REQUESTED INSTRUCTION No. 31

To assist the court in considering appellant's speci-

fications of error 4 and 5 which relate to instructions given and proposed, appellee has set forth in its appendix all of the instructions of the court with the exception of stock instructions, that are not involved in this appeal. (App. pp. 4 to 10)

Appellant complains of certain portions of the instructions relating principally to the definition of dishonesty and also the requirements upon the appellant as far as proving either fraud or dishonesty. The questioned instructions are printed in italics in the appendix herein. (App. pp. 4 to 6)

Complaint is made that although the bond uses the words "fraud or dishonesty" in the disjunctive, the court did not submit these two terms in the alternative. This, of course, is not true, as a reading of the instruction will readily reveal. The cases do hold, however, that fraud does embrace dishonesty and that is the law in the State of Washington. *Brown v. Underwriters at Lloyd's, 53 Wash. (2d) 142, 322 Pac. (2d) 228.*

Complaint is also made because the court required proof of intent to defraud or intent to be dishonest. Intent is an integral part of either fraud or dishonesty and one cannot be unintentionally fraudulent or dishonest.

No cases have been cited supporting appellant's position that intent is not required in the proof of either fraud

or dishonesty. The Washington rule clearly requires intent. *Brown vs. Underwriter's at Lloyd's*, supra, page 61

It is stated in *45 C.J.S., Insurance, Section 802, page 852* that:

> "The terms 'fraud' and 'dishonesty' include any acts which show a want of integrity or a breach of trust. However, where the offenses named are one which commonly denote consciously wrongful conduct or involve moral turpitude, protection is intended against some positive act of wrongdoing, some form of dishonesty and the conduct causing the loss must involve some such characteristics to be within the bond."

In *Foster vs. Bowen, 311 Mass. 359; 41 N.E. (2d) 181*, the court in commenting upon the coverage of fidelity bonds and the construction of them stated:

> "The coverage of the bonds is not limited to strictly criminal acts. But the bonds were intended as protection against dishonesty and not as security in the ordinary sense for a balance which an accounting might show to be due. There is significance in the collective use of the expressions selected to define the coverage. All of them commonly denote conduct that is consciously wrongful. Indeed, only the words 'fraud', 'fraudulent', and 'misappropriation' seem capable of any other meaning, and these words must be defined with reference to the context in which they appear. *There is to be discerned in the decided cases a tendency to construe bonds worded as these are as insuring against the consequences of conduct of the employee that is intentionally and consciously dishonest and fraudulent and as not insuring against the consequences of acts done in actual good faith without intentional fault.*" (Citing cases)

* * * * *

> "In our opinion the bonds did not cover acts as were in fact innocently done and were merely constructively or technically a 'fraud', or 'fraudulent', even though they might constitute a breach of Cushing's obligations as an officer of the company and so give rise to a cause of action against him."

It is asserted that the appellant's proposed Instruction No. 31 correctly sets forth the law that reckless, wilful and wanton disregard for the interests of an employer palpably subjecting him to likelihood of loss is in law dishonest. An examination of the cases cited by appellant in support of this contention on page 59 of its brief reveals that the cases do not state that reckless or wanton conduct is sufficient proof of dishonesty but in practically every instance reiterate the rule above stated that intentional misconduct and intent are a requirement.

On the other hand, the following cases and states support the majority rule that the surety or indemnitor is liable only for intentional acts of dishonesty and intentional fraud as distinguished from mere wanton and reckless disregard for the employer's interests.

Also from *Massachusetts*, there is the case of *Gilmour v. Standard Surety and Casualty Company of New York, 292 Mass. 205; 197 N. E. 673.*

2. *Alabama:*

Louis Pizitz Dry Goods v. Fidelity & Deposit Co., of Maryland, 223 Ala. 385; 136 So. 800.

3. *Arkansas:*

United States Fidelity & Guaranty Co. v. Bank of Batesville, 87 Ark. 348; 112 S. W. 957.

4. *California:*

Taylor v. DeCamp, 132 Cal. App. 640; 23 Pac. (2d) 61 (Cites 25 C. J. 1093)

5. *Colorado:*

American Surety Company of New York vs. Capitol Building & Loan Association, 97 Colo. 510; 50 Pac. (2d) 792.

6. *Georgia:*

Massachusetts Bonding and Insurance Company v. Raskin, 43 Ga. App. 582; 159 S. E. 778.

7. *Indiana:*

Sparta State Bank v. Myers, 117 N. E. 258.

(" Such bonds insure the employee fidelity not his skill.")

8. *Iowa:*

(1) *Andrew v. Hartford Accident & Indemnity Company, 207 Iowa 652; 223 N. W. 529.*

(2) *Birrell Inc. v. Fidelity & Casualty Company of New York, 188 N. W. 26.*

9. *Kansas:*

(1) *Aetna Building and Loan Association v. Central Surety and Insurance Corporation of Kansas City, Mo., 145 Kans. 622; 66 Pac. (2d) 577.*

(2) *Kansas Flour Mills Co. v. American Surety Co., 98 Kan. 618; 158 Pac. 1118.*

10. *Kentucky:*

Home Owned Stores v. Standard Accident Insurance Company, 256 Ky. 482; 76 S. W. (2d) 273.

11. *Louisiana:*

(1) *Crescent Cigar and Tobacco Co. v. National Casualty Company, 155 So. 505.*

(2) *Curran and Treadaway v. American Bonding Company of Baltimore, 193 La. 763; 192 So. 335.*

12. *Minnesota:*

Village of Plummer v. Anchor Casualty Company, 240 Minn. 355; 61 N. W. (2d) 225.

13. *Missouri:*

Bank of Hammond v. Garner, 235 S.W. 822.

14. *Mississippi:*

Seelbinder v. American Surety Co., 155 Miss. 21; 119 So. 357.

15. *New Jersey:*

Mortgage Corporation of New Jersey v. Aetna Casualty and Surety Company (Cited and discussed above)

16. *New York:*

(1) *Bank of Edgewater N. J. v. National Surety Company, 243 N. Y. 34; 152 N. E. 456.*

(2) *World Exchange Bank v. Commercial Cas. Co., 255 N. Y. 1, 173 N. E. 902.*

17. *Pennsylvania:*

(1) *Universal Credit Company v. United States Guaranty Company, 321 Pa. 209; 183 Atlantic 806.*

(2) *Bank of Erie Trust Company v. Employers Liability Ins. Corp., 322 Pa. 132; 185 Atlantic 224.*

18. *Rhode Island:*

Jamestown Bridge Comm. vs. American Empire Insurance Co. 85 R. I. 146; 128 Atlantic (2d) 550.

19. *South Carolina:*

Salley vs. Globe Indemnity Company, 133 South Carolina 342; 131 S. E. 616 (43 A.L.R. 971)

20. *Tennessee:*

Fidelity-Phenix Fire Insurance Company of New York v. Jackson, 181 S. W. (2d) 625.

21. *Texas:*

American Surety Co. v. Gracey, 252 S. W. 263.

22. *U. S.:*

(1) *Irvin Jacobs & Company v. Fidelity & Deposit Company of Maryland (C.A. 7) 202 Fed. (2d) 794.*

(2) *Sade vs. National Surety Corp. (D. C. of D. C. 1962) 203 F. S. 680.*

23. *Wisconsin:*

Humbird Cheese Co. v. Fristad, 208 Wisc. 283; 242 N. W. 158.

("Wilful" as used, implies "purpose to do act and do wrong and implies an evil intent".)

Thus, if we go back to the Parker case in Washington we find 24 jurisdictions definitely favor appellee's position herein.

The court in its instructions defined in considerable detail the relationship of employer and employee and pointed out the duties upon the part of the employee to the employer. The jury was instructed to consider the breach or breaches, if any, of the duties set forth in making their determination as to whether or not the principals were guilty of fraud or dishonesty. (Appendix, pp. 6 to 8) It is thus apparent that the appellant's theories of the case were submitted to the jury albeit not in the precise language sought.

The instructions also referred to omissions of the principals and therefore the point of passive dishonesty

was obviously covered. Referring again to the interrogatories (R. pp. 129-132) fraud and dishonesty were submitted to the jury in the alternative, and if the jury found that the principals were guilty of either fraud or dishonesty, they were instructed to answer the interrogatories in the affirmative. The fact that the interrogatories were not separately put to the jury is of no consequence.

There was no error in the instructions.

THE COURT CORRECTLY RULED ON REFUSING TO ADMIT CERTAIN EVIDENCE AND LIKEWISE REFUSING TO STRIKE OTHER TESTIMONY

The errors asserted upon the evidentiary rulings are set forth in specifications of error 6 and 7. It is claimed that certain statements attributed to Rivon Jones, Claims Superintendent of St. Paul, who was present throughout the trial, should have been admitted. These statements were sought to be introduced in evidence through Donald Sherwood, although, as stated above, Mr. Jones was present throughout the trial.

It is claimed that Jones stated to Sherwood in effect that Chamberlin and Walker were in it together and both should have joint rooms at the state penitentiary. That further, S. & R.'s reputation was such that it couldn't be associated with two crooks like Walker and Chamberlin. It is obvious that these claimed admissions are nothing more than statements of opinion and not of fact. They

are not a part of the res gestae as no attempt was made to connect them up time-wise with the transactions.

In *Liljeblom vs. Department of Labor & Industries, 57 Wash. (2d) 136; 356 Pac. (2d) 307*, it was held that it was reversible error to admit the statements of a doctor employed by the defendant Department of Labor and Industries, such statements having to do with the doctor's dignosis that the claimant needed further treatment, was totally disabled, etc., the court holding that the statements were not binding upon the Department because they were the witness's opinions only. On page 143 the court stated:

> "An agent's statement to be admissible in evidence against his principal, must be a statement of fact and not the expression of an opinion. Albertson v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 242 Minn. 50, 64 N.W. (2d) 175, 42 A.L.R. (2d) 1044 (1954); Borden v. General Ins. Co., 157 Neb. 98, 59 N.W. (2d) 141 (1953); Romo v. San Antonio Transit Co., (Tex. Civ. App.) 236 S.W. (2d) 205 (1951); Briggs v. John Yeon Co., 168 Ore. 239, 122 P. (2d) 444 (1942); Edwards v. Maryland Motor Car. Ins. Co., 204 App. Div. 174, 197 N.Y.S. 460 (1922); 31 C. J. S. 1113, § 343. The only portion of the report to which appellant objected contained Dr. Steele's opinion. The opinion evidence was not admissible."

In re *Allen's Estate, 54 Wash. (2d) 616; 343 Pac. (2d) 867*, the court quoted from the concluding paragraph of *31 C.J.S. 958, Section 217*, as follows"

> " . . . (1) Declarant must be unavailable as a witness. (2) The declaration must have related a fact against the apparent pecuniary or proprietary interest of de-

clarant when his statement was made. (3) The declaration must have concerned a fact personally connizable by declarant. (4) The circumstances must render it improbable that a motive to falsify existed . . . "

It is thus apparent that the testimony of the alleged admission by Mr. Jones was properly excluded because Mr. Jones was not only present in court but the statement at most was merely his opinion and would have been a flagrant invasion of the province of the jury.

Appellant does not argue its specification of error number 7, but in answer to this specification of error appellee wishes to point out that it involved a discretionary matter for the court to determine.

The testimony of Robert Day was material and proper and concerned negotiations between S. & R. and Palmer Walker. It involved testimony of S. & R. attempting to accomplish a consolidation of the Walker corporation indebtedness arising out of deficiencies. It was proof of S. & R. attempting to accomplish the same thing that they have criticized Chamberlin so bitterly for, namely, Chamberlin's consolidation of the Walker deficiencies in November, 1958, and his consolidated loans with Walker Motors at Kennewick on July 31, 1959. On both evidentiary rulings the trial court was correct.

CONCLUSION

Appellee respectfully urges that the entire case in-

volved conflicting evidence and conflicting theories that were fully and fairly tried and presented to the court and jury. That the applicable law was correctly stated in the instruction to the jury and that the jury thereupon rendered its verdict by answering interrogatories favorable to the appellee. Substantial evidence exists in support of the jury's verdict and this court, even in the event it should have different views of the evidence than the jury, nevertheless must accept the jury's verdict as being final and conclusive. The verdict of the jury and rulings of the trial court should in all respects be affirmed.

Respectfully submitted,

FRED C. PALMER
Of Palmer, Willis & McArdle
Attorneys for Appellee

April 20, 1963

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRED C. PALMER
Attorney for Appellee

APPENDIX

OF

APPELLEES

Pls. Ex 73

Kennewick, Washington
June 8, 1960

Mr. Robert S. Day
Attorney at Law
1329 Geo. Wash. Way
Richland, Washington

Re: Stock — Tri City Rambler Inc.

Dear Bob:

I am enclosing the stock certificate issued to me covering Ten (10 Shares of Capital Stock in Tri-City Rambler Inc. You will find it properly endorsed for disposition.

I did not request this stock, I did not pay for this stock, I do not want this stock, I objected to the issuance of this stock.

I assume this stock can be taken off the books in the same manner that it was put on the books.

I did not consent to hold this stock for any financial gain, and further explained that I could not accept any financial gain. I will not accept any payment for this stock.

I trust your disposition of this stock will end what has been an embarrassing and disgusting delay in the negotiations of your client.

Very Truly Yours,

R. D. Chamberlin

bcc/Donald Sherwood

Defs. Ex. A-21

SHERWOOD & ROBERTS, INC.

Post Office Box 1020 106 North Second Avenue Telephone JA 5-3500
WALLA WALLA, WASHINGTON

To Executive Committee Date 5-23-60

From Bert R. Edwards

Subject Executive Committee Meeting
May 23, 1960

Meeting convened at 12:00 noon with Roberts and Edwards present.

The following matters were decided and agreed upon:

1. The salary adjustment for Theodore M. Schmidt from $400 to $450 per month, effective June 1, was approved. This action takes the place of the adjustment made May 9.

The following subjects were discussed and reviewed:

1. *Tri-City offices.* Robert Chamberlin's resignation as of May 13 was duly noted and the circumstances of the Walker Motor Co. loan and commitment authority were discussed. Edwards reported his conversations with Robert Chamberlin on May 19 concerning Cabadab, termination pay, radio station KYSS, the license application at Richland, the Mad Turk suit, etc. *We have no disagreement with Chamberlin.* (Emphasis added)

   It was noted that Chamberlin gave John Thompson a cash credit for 1959 vacation which Thompson had not taken, running said credit through the real estate register for March.

   Dave Clancy is continuing to assist John Koster in

the management of the Tri-City offices. Chamberlin has moved out.

W. G. Strong is applying himself to a clean-up campaign at Kennewick.

The lease on the Pendleton office was approved subject to criticisms listed in a formal letter to that office.

2. *Dean Dion.* Our relationship with Dion has been terminated. Dave Clancy having supervised the conclusion of the matter by taking title to two lots in Pasco for Dion's indebtedness in the approximate amount of $3,400.00 and by giving Dion a check for $255.00 for his ownership of 25% of the capital stock of Cabadab. It is noted the lots were appraised by James Aylward and Ken Brown at $3,500.00.

3. *Bonus Recommendations.* It was noted that bonus recommendations have been received from all of our offices since the last meeting of the Executive Committee.

4. *Position of Manager at Tri-City Area.* Applications have been received from James Aylward, Charles Erwin, John Koster, and Warren Hartley, each having been acknowledged to the applicant.

5. *Yakima office.* The request of the Yakima office for an increase in finance loan volume was discussed.

Meeting adjourned at 1:30 p.m.

nl
cc Gordon Johnson

(R. Vol. 10, pp. 2299-2306)

COURT'S INSTRUCTIONS IN PART

The terms "Fraud" or "dishonesty", as used in the bond, are to be given their usual meaning as the ordinary person understands them. However, I will give you a brief definition of each which should aid in guiding your understanding of these words as they are used in the bond.

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him injury. As distinguished from negligence or an injury caused by thoughtlessness, it is always intentional. Fraud in its very essence requires a preconceived intention to deprive another of some property or money.

Dishonesty likewise consists of some intentional act which is committed with the foreknowledge that injury will result or is likely to result to another person. A dishonest act may be done with the hope that it will go undetected or that no harm will result but it is nonetheless dishonest. Dishonesty is included in fraud. An integral part of each act is an intent to deceive.

The term "connivance" likewise should be given the usual meaning as the ordinary person understands it to be. This definition, though, may be helpful to you: "Connivance relates to an agreement or consent, indirectly given, that something wrongful shall be done by another." In

other words, it defines a situation where one person knowing another is doing wrong, allows such conduct to continue without interference.

As you will recall, the parties have agreed that only fraud and dishonesty need be considered in this case. This is because the other bond provisions, to-wit, forgery, theft, larceny, misappropriation and wrongful abstraction, all are equivalent to dishonesty and fraud as I have defined those words. Thus, it is not necessary for the plaintiff to establish that any of the four principals was guilty of a criminal act, or that he would be subject to criminal prosecution of any kind. Therefore, if you find that fraud or dishonesty, or both, including intent to defraud the plaintiff, have been proved to your satisfaction by a fair preponderance of the evidence as to any of the plaintiff's contentions which I recited earlier, the plaintiff has sustained its burden of proof as to such contention or contentions. However, if you find that neither fraud nor dishonesty, including intent to defraud the plaintiff, have been proved to your satisfaction by a fair preponderance of the evidence, then in that event the plaintiff has not sustained its burden of proof as to such contention or contentions.

Fraud in its nature is not a thing readily susceptible of direct proof. Fraud must, in its very nature, usually be proved by inferences and circumstances shown to have been involved in the transactions which are in question. The same is true with respect to dishonesty. In this regard

I instruct you that it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted.

In your consideration of this case you must presume that all men are honest and that individuals deal fairly, that private transactions are fair and regular, and that participants act in honesty and good faith. This presumption must contoinue to guide you until you are satisfied to the contrary.

There is no liability under the bond and the law does not impose any liability on the part of the defendant for neglect, incompetence, the unwarranted extension of credit, losses resulting from mismanagement or the use of poor business judgment by any of the principals covered under the bond. Also, there is no liability for mere debts arising out of the acts or omissions of any of the principals.

In short, if you find that the acts or omissions which the plaintiff claims were dishonest and fraudulent were instead only the unfortunate result of good faith transactions, then the plaintiff has not sustained its burden of proof.

As to each of the contentions involving alleged dishonesty or fraud, you will consider all of the facts and circumstances in the evidence, including the relationships of the said principals to their employer and to each other, and to third persons or parties who were referred to or connect-

ed with any transaction or occurrence revealed by the proof.

The relationship of employer and employee requires the following duties upon the part of the employee to the employer:

1. That an employee is not to seek personal gain, with with respect to his employment, beyond his agreed compensation without first disclosing the circumstances to and obtaining the approval of his employer.

2. That an employee is not to engage in any transaction for personal profit with a customer of the employer with whom the employee deals, without the employer's knowledge and consent.

3. That an employee is not to engage in any business activity which conflicts with or may be detrimental to the employer's interest, without the employer's knowledge and consent.

4. That an employee is not to conceal or withold information, such as a borrower's true financial status or ability to repay money loaned, which information is necessary to the employer's competently and intelligently evaluating his business risks.

5. That an employee is not to acquire or maintain any ownership interest in the business of a customer

or the employer with whom the employee deals without his employer's knowledge and consent.

6. That an employee is not to borrow money from his employer without the employer's knowledge and consent.

7. That an employee is not to release collateral securing a loan made by the employer which increases the business risks of his employer without the employer's knowledge and consent.

8. That an employee is to take adequate security for loans made by or on behalf of the employer which the known facts indicate require such security unless the employer with full knowledge of the facts and circumstances consents otherwise.

9. That the employee so far as possible shall follow the employer's instructions as to all things pertaining to the relationship.

A breach of one or all of the foregoing duties does not necessarily in and of itself indicate that there was any fraud or dishonesty with respect to the plaintiff's contentions. In fact, mere breach of duty without fraud or dishonesty, as I have heretofore defined those terms, is not a sufficient basis upon which you can find for the plaintiff or answer an interrogatory in the affirmative. However, you may consider such breach, if any, in determining whether any one or more of the principals acted fraudu-

lently or dishonestly, keeping in mind, however, that the plaintiff must prove its contentions to you by a fair preponderance of the evidence.

The plaintiff contends and the defendant concedes that there was a lack of good faith on the part of the principal John Koster in his signing the name of John Kilthean to a check made payable to said Kilthean in the amount of $425.00. You may only consider this, however, together with all other evidence in the case, for the purpose of determining whether John Koster acted fraudulently or dishonestly, with respect to the plaintiff, as I have defined those terms, keeping in mind that the plaintiff must prove its contentions to you by a fair preponderance of the evidence.

While the law will not presume fraud or dishonesty nor infer it merely because loans made by an employee of his employer's funds were irregular, unsafe or unsound, such factors may nevertheless be considered by you together with all of the evidence to aid in the correct determination of whether fraud or dishonesty was, in fact, involved in any of the transactions contended by the plaintiff to have been fraudulent or dishonest.

If any one of the principals is found from a fair preponderance of the evidence to have made or caused to be made any dishonest or fraudulent loan to a borrower or borrowers, then it would be immaterial that any such prin-

cipal, at the time of making any such fraudulent or dishonest loan, may have hoped or expected that the particular borrower might ultimately repay such loan or loans.

None of the evidence presented during the trial of this case concerning the Cabadab transaction or the Radio Station KYSS transaction shall be considered in your deliberations in this case.

No. 17955

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MORRIS JOSEPH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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No. 17955

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MORRIS JOSEPH,

Appellant,

vs.

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Appellee.

APPELLE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On April 13, 1961, the Grand Jury for the Southern District of California returned an Indictment charging the appellant Morris Joseph in six counts and his co-defendant Morris Clifford in two counts with violations of the narcotics laws of the United States as proscribed in Title 21, United States Code, Section 174 [C. T. 2-7].[1] The appellant, represented by attorney Harold Cutler, and his co-defendant, who was without counsel, were arraigned in the court of the Honorable Harry C. Westover on April 17, 1961, and, in order that the defendant Clifford might obtain an attorney, all further proceedings were continued to April 24, 1961 [C. T. 8]. On the latter date both the appellant and

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[1]C. T. refers to Clerk's Transcript of Record.

his co-defendant, with their respective attorneys Harold Cutler and Robert Barnett, were present in the court of Judge Westover and entered pleas of Not Guilty to all counts. The case was then transferred to the calendar of the Honorable William C. Mathes for all further proceedings [C. T. 9]. In the afternoon of April 24, 1961, both defendants appeared with their counsel in the courtroom of Judge Mathes; at that time the defendants requested trial by jury and the Court ordered the case set for call of the calendar on May 1, 1961 and trial on May 2, 1961 [C. T. 10]. On May 1, 1961, motions by counsel for both defendants for a continuance were denied and a jury was impaneled [C. T. 11]. On May 2, 1961, the trial of the matter commenced [C. T. 12]. The trial continued on May 3, 1961, and culminated on May 4, 1961, with the return of a verdict of Guilty as to appellant Joseph on all six counts. The co-defendant Clifford was acquitted on one count and convicted on the other [C. T. 13, 14]. At the conclusion of the trial the defendant Clifford was sentenced to the custody of the Attorney General for a period of five years and the appellant Joseph was committed to the custody of the Attorney General for imprisonment for sixty years [C. T. 14]. On May 16, 1961, the appellant's motion for a stay of execution was denied [C. T. 24]. On September 11, 1961, appellant Joseph's motion to modify sentence was denied [C. T. 36].

The jurisdiction of the United States District Court is premised on Section 3231 of Title 18, United States Code. The appellant filed a timely notice of appeal on May 15, 1961, pursuant to Rule 39 of the Federal

Rules of Criminal Procedure [C. T. 23]. The jurisdiction of the Court of Appeals to entertain this matter is set forth in Title 28, United States Code, Sections 1291 and 1294.

II.

STATEMENT OF THE FACTS.

The question involved in this appeal is whether the appellant was denied his Sixth Amendment right to effective representation by counsel when, on the date of plea, the trial court overruled the motion by the appellant's attorney for a continuance and set the case for jury trial one week later. Since an analysis of the appellant's contention necessarily involves an appraisement of the facts; they are set forth below. The actual motions for a continuance and the colloquies which then ensued between court and counsel are set forth after the fact summary.

William Green, who at the times hereinafter related resided in San Francisco, California, was retained by the Federal Bureau of Narcotics as a special employee, *i.e.,* an informant. In seeking to arrange a narcotics purchase the informant, acting in an undercover capacity, contacted Isaac Abney, an old source of supply in the Los Angeles area. Abney indicated that he could obtain heroin for Green and, when queried, replied that his source was Morris Joseph. Green indicated that he would prefer dealing directly with Joseph, and Abney promised that he would seek to effectuate a meeting between Green and Joseph [R. T. 289]. Abney was unable to reach Joseph despite repeated telephone calls and so notified the Government employee [R. T. 290]. However, Green did obtain the appellant's busi-

ness address and made several unsuccessful personal calls to Joseph's barber shop on Adams Boulevard in Los Angeles, California.

In January of 1961 a meeting was effected when the shop manicurist introduced Green as the party for whom Mr. Abney had been calling. After the introduction, Green broached the subject of narcotics purchases but was quieted by Joseph who stated that he did not wish to discuss the subject at that time [R. T. 247]. Green communicated the news of his meeting to the San Francisco office of the Federal Bureau of Narcotics.

In February of 1961 Green met with agents from the Los Angeles and San Francisco offices of the Federal Bureau of Narcotics; this meeting took place at the Colony Motel in Los Angeles [R. T. 52]. From his motel room, Green placed a telephone call to the appellant's barber shop and, following a conversation with Joseph, he drove to the shop. Upon his arrival Green found the shop closed but his knock was answered by Joseph [R. T. 249]. At that time the two men engaged in a conversation relative to the purchase of heroin. A quantity and price having been arrived at, they parted company—ostensibly, because Green had to return to his hotel to obtain the purchase price. It was agreed that they would meet again at 9:00 P.M. that evening at the corner of Pico and Spaulding Boulevards in order that the transaction might be consummated [R. T. 251].

The special employee returned to his motel room and related the status of his arrangements to the agents. The agents then searched Green and his automobile

and, shortly before the appointed hour of the meeting, followed in their vehicles as the informant drove to the prearranged meeting place. The informant arrived at the designated corner at 9:00 P.M. and was seen to wait in his parked car until 9:10 P.M.; at that time the appellant Joseph arrived in his light-colored 1961 Thunderbird convertible [R. T. 54, 251]. The Thunderbird pulled alongside Green's vehicle and Green observed that Joseph was the only occupant. At the appellant's suggestion, Green followed in his car as Joseph drove to 1071 South Genesee—the appellant's residence [R. T. 200]. At that time both men left their vehicles and entered the house at that adddress. Following an introduction to members of the household, Green was led by Joseph to his dressing room [R. T. 252]. At this time the two were alone and Joseph stated that he had access to unlimited sums of heroin and cocaine. Apparently in order to substantiate his statement, the appellant exhibited a loose quantity of the two narcotics to Green [R. T. 253]. The appellant then indicated that he did not have the required quantity of heroin at hand and stated that he desired payment on the spot and, in return, he would contact his "stash," *i.e.*, in the parlance of the narcotics trade a place, normally other than the owner's residence, where the narcotic is maintained or cached, in order that he might supply the purchased heroin. The special employee than gave Joseph $350.00 of Official Government Advance Funds and Joseph promised to call the informant's motel later in the evening [R. T. 254].

The Government employee did return to the motel where he was searched and related what had occurred [R. T. 55]. At 10:45 P.M. Green received a call from

Joseph indicating that the party with whom he had left his supply was not home and could not be expected until after midnight. The appellant then requested Green to call him after midnight at Webster 9-4323 [R. T. 56, 255]. The Webster phone number is the one at the 1071 Genesee address [R. T. 199]. Several calls were made by Green to the number given him by Joseph but none answered [R. T. 58, 59, 255]. Finally, at 8:00 P.M. the following day, February 21, 1961, the special employee did reach the appellant and arrangements were made for Green to call at the Genesee address in order that the delivery might be completed. After a search of the special employee and his automobile, the agents followed in their cars as the special employee drove to meet the appellant on Genesee. At approximately midnight the evening of the 21st Green parked in front of the appellant's house and entered the premises. The appellant met the Government agent within the house and handed him the quantity of heroin upon which counts one and two of the indictment were based. The informant left the residence and met with the agents a short distance from the house and handed them the heroin [R. T. 60, 258].

Subsequent to this purchase the informant and several of the agents returned to the San Francisco Bay area. Following their return the narcotics officers determined that further narcotic "buys" from the appellant were necessary to an investigation relative to Joseph's source. At the instance of the law officers, the special employee on February 27, 1961, placed three monitored calls to WEbster 9-4323 in Los Angeles [R. T. 64, 262]. As a result of these calls, it was agreed by Mr. Joseph and Mr. Green that the former

would supply an additional quantity of heroin to the special employee if he would fly to Los Angeles. The following morning Green and two narcotics officers boarded a flight to Los Angeles. Enroute the special employee was searched, outfitted with a Fargo transmitter and given $900.00 of Government money in order that he might complete the proposed purchase. The plane arrived at Los Angeles International Airport at 9:40 A.M. on the morning of February 28, 1961, and Green called the previously mentioned Webster number as soon as he entered the terminal [R. T. 65, 263]. The appellant Joseph answered the phone, requested Green's number and stated that he would call back momentarily. Joseph did not call as promised and Green placed another call to the Webster number; again Joseph answered and this time requested that Green meet him at the barber shop. Green indicated that this was impossible because of his scheduled return flight to San Francisco; Jospeh then stated that he would drive to the airport [R. T. 71, 266]. One half hour later Joseph in his Thunderbird pulled alongside the walk bordering the air terminal building; at that time the agents observed Green join him in the automobile [R. T. 73, 267]. The car pulled away and entered the thoroughfare adjacent to the air terminal facility. A short distance later Joseph made another turn and returned to the parking area adjacent to the terminal. At this time Joseph brought his car alongside a parked 1951 two-tone Chevrolet in which the defendant Clifford was sitting [R. T. 267]. Joseph then drove ahead and Clifford followed in his car. The two cars turned onto an access road adjacent to the freight terminal and parked within a half block of one another. At

that time Green handed Joseph $830.00 and the latter exited the vehicle and appeared to join the defendant Clifford at his automobile. Joseph returned minutes later and handed Green a package containing the heroin occasioning counts three and four of the indictment [R. T. 74, 269, 311]. Both cars then drove off the access road and Joseph dropped Green off in front of the terminal in order that he might meet his plane. Upon entering the terminal building, Green was immediately joined by the narcotics agents who escorted him to the men's restroom where Green surrendered the package containing the narcotics [R. T. 76].

The last transaction occurred on March 10, 1961. In the morning hours of that day Green joined the narcotics agents at their office in San Francisco and placed several monitored calls to Joseph at the Webster number in Los Angeles [R. T. 78, 274]. As a result of these calls, special employee Green, accompanied by two law enforcement officers, flew to Los Angeles that afternoon. In flight Green was again searched by the officers, outfitted with a transmitting device and given $600.00 with which to purchase the narcotics. This time the plane landed at the Lockheed Airport in Burbank, California, a suburb of Los Angeles [R. T. 79, 276].

Upon entering the air terminal building, Green placed several calls to the Webster telephone number but no one answered. At 6:05 P.M. another call was placed by Green and this time Joseph answered the phone [R. T. 80]. A conversation ensued in which Joseph stated that he would be out in the time it took him to drive from his home to the air facility [R. T. 281].

A seemingly proper period of time lapsed and still Joseph had not appeared at the airport. Green again phoned the Joseph residence and talked with Joseph; at this time the appellant indicated that he had been unable to find his way and requested Green to meet him at the northeast corner of La Cienega and Olympic Boulevards in Los Angeles. Green agreed to the meeting place and was immediately driven by the agents to the assigned corner where a Richfield gas station was located. Green alighted a short distance from the station and, under surveillance, walked to the station. Green arrived at approximately 7:15 P.M. and, not finding the appellant, so indicated this to the agents. An agent joined Green and it was determined that another call would be placed to the Joseph telephone number. The call was placed, Joseph answered and responded that he would join Green at the station immediately [R. T. 83, 282]. The agents and Green then separated and minutes later, as surveillance was maintained, Joseph arrived in his Thunderbird and pulled to the curb to allow Green to enter the vehicle. Green entered and Joseph then circled the rear of the station and entered the east flow of traffic on Olympic Boulevard. Almost immediately Joseph made a lefthand turn onto Schumacher Drive and halted the vehicle in order to allow the waiting defendant Clifford to enter the car [R. T. 87, 131, 283]. After Clifford entered the vehicle, it continued a short distance up the street and turned about to again face Olympic Boulevard. The turn having been completed, Joseph parked the car and proceeded to renegotiate price and quantity with Green. An agreement was reached and Green handed Joseph the money in exchange for the package which Clifford

had brought with him. Joseph started the car and drove again to the Richfield station where Green left the car. Joseph and Clifford then drove off and Green was joined moments later by the surveilling agents to whom Green turned over the package which he had received on Schumacher Drive. An examination of the package's contents revealed the heroin upon which counts four and six of the indictment were premised [R. T. 87, 285].

There were no further transactions and the case terminated with the arrests of Joseph and Clifford some days after the last narcotics purchase.

In his appeal the appellant does not question the aforementioned facts; rather he looks to the amount of time allotted his counsel for preparation and states that it was insufficient—in fact he states that the time was so limited as to deprive him of the effective assistance of counsel. The vehicle for the appeal is the trial court's continued denial of appellant's motions for a continuance.

The facts reveal that the appellant with his defense counsel Harold Cutler appeared on April 17 and 24 of 1961 in the Honorable Harry C. Westover's courtroom in order that he might be arraigned and plead. After entering a plea of not guilty his case was transferred to the calendar of the Honorable William C. Mathes [R. T. 8, 9]. The reporter's transcript then reveals that on April 24, 1961, the appellant ap-

peared with his counsel Harold Cutler in the courtroom of the Honorable William C. Mathes and when the court clerk called the appellant's case for jury trial, Mr. Cutler indicated that the defendant Morris Joseph was "ready" [R. T. 5]. However, when the case was set for call of the calendar on May 1, 1961, and trial on May 2, 1961, attorney Cutler indicated that he was already retained in a state criminal case which was set for trial on May 1, 1961. The Court then stated that "something might happen to that one" and there was no further discussion [R. T. 6, 7].

The following Monday, May 1, 1961, at 1:30 P.M. the appellant Joseph was again present in Judge Mathes' courtroom and was represented by attorney Cutler. When the court stated that the trial was to commence the following day; Cutler indicated that he was already engaged in another court, had had insufficient time to prepare and therefore moved for a continuance. The Court denied counsel's motion [R. T. 9, 10, 11].

Prior to the selection of a jury at 3:30 P.M. on the same date, the Court again denied a motion for a continuance [R. T. 12]. Following completion of the jury selection the trial was recessed until the following day May 2, 1961, at 9:30 A.M.

On May 2, 1961, the trial commenced and at the conclusion of Government counsel's opening argument, the appellant's attorney Mr. Cutler, renewed his motion for a continuance—it was again denied [R. T. 27, 28].

During the course of the trial on May 3, 1961, the court indicated to the jury and counsel its reason for denying the repeated motions for a continuance, *i.e.*, "It didn't suit the calendar of the court to wait awhile." [R. T. 273].

Again on May 3, 1961, at the conclusion of the Government's case in chief, Mr. Cutler repeated his motion for a continuance. It was denied [R. T. 355]. Mr. Cutler reiterated his motion after a short recess and the following colloquy, illuminative of the reasoning of court and counsel, occurred:

> "Mr. Cutler: At this time, we again will move for a continuance upon the grounds that I have previously stated. I have been unable during the course of this trial, since I originally made that motion when we first began the trial, to complete all of the work which I believe is necessary for the defense of this case.
>
> "Your Honor has kept the sessions going late. Monday we got out something like 5:30, and last night it was past 6:30. I apprised the court originally that I had other matters.
>
> "I submit to the court that in a case involving possible penalties that can be dealt in this case, which is as severe or more severe than a capital case, that a week before trial, from the time of entrance of a plea of not guilty, one week is not sufficient time to prepare a defense.
>
> . . .

"The Court: As I say, I have seen so many of these cases, and I would say that in easily nine out of ten of them the defense has put no witnesses, not even the defendant, on the stand. Nothing happens. As soon as the Government, rests, except for some motions, the case is over.

"Now, lawyers come in here—Mr. Osborne obviously didn't want to go to trial, either. I forced him to go to trial. He didn't want to go to trial. You didn't want to go to trial. And I have tried cases for twenty-one years at the Bar, and I saw many times where I didn't want to go to trial for various reasons, and sometimes dozens of reasons.

"As far as the time to prepare the defense in one of these cases is concerned, a week should be more than sufficient, unless there is some special circumstance, because I have never seen one of these cases brought except that the agents oversaw the transaction and testified to overseeing the transaction, or conducted the transaction themselves.

"Mr. Cutler: I don't feel, with all due respect to the court, that an attorney's preparation of his case should be determined by the court's personal experience with respect to a particular type of case.

"The Court: I have to rule upon how much time you need because I daresay that if you had your way about it, and Mr. Joseph and Mr. Clifford had their way about it, this case would never go to trial, if they were at large on bail. I have never seen a defendant yet who was willing to go

to trial unless he happened to be in jail. And it's really remarkable the excuses that can be thought up for not going to trial.

"If you have something you want to do to prepare for your defense and you show me that it has any semblance of anything, I will be glad to listen to it. But just a general showing of not wanting to go to trial—you have had a week to prepare it. If you weren't ready to undertake the case, you had no business accepting a retainer.

"Mr. Cutler: If I may—

"The Court: Now—you may, yes.

"Mr. Cutler: I may say to the court that I accepted the case approximately two weeks prior to the time of the plea—one week prior to the time of the plea of not guilty. Now at that time, as every other attorney, I am sure, we have other matters to take care of. I have spent what little time I had during the week in my spare time making arrangements to take care of these matters so I could be present in court.

"It is my personal opinion that one week in which to prepare a case in which this particular defendant could get possibly 120 years is not sufficient time of preparation. I informed the court of my desire for a continuance. I didn't ask for a long one. I asked for a short one." [Emphasis added; R. T. 363-366].

Based upon the above motions the appellant contends that his conviction should be reversed.

III.
ARGUMENT.

Appellant Was Not Deprived of His Sixth Amendment Right to Effective Assistance of Counsel.

A. A Defendant Has a Constitutional Right to Effective Assistance of Counsel.

The Government does not dispute appellant's contention that that portion of the Sixth Amendment which reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.", has been interpreted by our Supreme Court to mean effective assistance. See *Powell v. Alabama* (1932), 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158. The dispute arises in the periphery of this black-letter law. The United States does take issue with the progression of the appellant's argument, namely, that if there has been a motion for a continuance on the claim that counsel does not have sufficient time to prepare, it is error *per se* to set and try a case within a week of the defendant's plea and motion.

B. The Granting of a Continuance Is a Matter of Discretion.

The processes of justice are best served by an orderly procedure in our court system. What may be orderly to the court may be chaotic to an attorney's calendar; this is a fact of every day court life. With the aforementioned principle in mind it can be seen that judges must be given a great latitude in arranging their trial

calendars. It is stated by the United States Supreme Court in the case of *Isaacs v. United States* (1895), 159 U. S. 487, 489, 16 S. Ct. 51, 40 L. Ed. 229:

> "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question. [Citations omitted.] . . ."

This statement of the Supreme Court has been echoed more recently in the Ninth Circuit cases of: *Torres v. United States* (9th Cir. 1959), 270 F. 2d 252; *Sherman v. United States* (9th Cir. 1957), 241 F. 2d 329; *Williams v. United States* (9th Cir. 1953), 203 F. 2d 85 and *Kramer v. United States* (9th Cir. 1948), 166 F. 2d 515.

C. The Court Did Not Abuse Its Discretion in Denying the Appellant's Motions for a Continuance.

Apparently, the appellant contends that the trial court abused its discretion inasmuch as its denial of the appellant's motion for a continuance deprived him of effective assistance of counsel. The Supreme Court has stated that the ". . . fact, standing alone, that a continuance has been denied does not constitute a denial of the constitutional right to assistance of counsel." *Avery v. Alabama* (1940), 308 U. S. 444, 447; 60 S. Ct. 321, 84 L. Ed. 377. Time to prepare is not determinative as witnessed by the *Avery* case, *supra,* in which the Supreme Court affirmed a death sentence where the attorneys had three days to prepare the defense. See also the Ninth Circuit case of

Spaulding v. United States (9th Cir. 1960), 279 F. 2d 65; in which it was held that one week was ample time in which to prepare a case for trial.

Instead of looking to time alone, the courts appear to have formulated a broader test which is well expressed in *Ray v. United States* (8th Cir. 1952), 197 F. 2d 268 where the court said at page 271:

> "Whether the time allowed counsel for a defendant for preparation for trial is sufficient will depend upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and the pertinent facts, and the availability of material witnesses. . . ."

For other cases on the test to apply see *Baker v. United States* (9th Cir. 1958), 255 F. 2d 619; and *Yodock v. United States* (M.D. Pa., 1951), 97 Fed. Supp. 307.

As a practical matter, this test has received application in this Circuit. In the *Torres* case, *supra,* Judge Barnes felt it necessary to examine the chronology of events. This examination revealed that on August 12th the appointed attorney requested that he be relieved inasmuch as the defendant would not contact him. The court relieved the first attorney and appointed a new one; at the time of appointment the court set the matter, without objection, for trial on August 14th. On the latter date the new attorney moved for a continuance as he had not had adequate time to consult with his client or to prepare the case for trial. The trial court proceeded with the selection of the jury and then continued the trial of the case to August 19th. On Au-

gust 19th the attorney renewed his motion for a continuance but it was denied and the matter proceeded to trial. On August 20th the court continued the case to August 21st and on that date the trial resumed; the defendant did not call any witnesses nor did he take the stand. That same day the jury reached its guilty verdict.

In holding that the trial court had not abused its discretion in refusing to grant further time for preparation the Court said at pages 254, 255:

> "After reciting some of the foregoing facts, counsel for the appellant says: 'There was thus very plainly no fair opportunity to prepare this case for trial by adequate consultation with the client, decent research of the law involved, investigation of the facts and careful preparation of the instructions.' *With this conclusion we cannot agree.*"
>
> . . .
>
> "Further, the situation which faces most trial courts, including the trial judge here, must be considered. To a certain extent, the lack of time for preparation on the part of appellant's counsel was due to the actions of appellant himself. . . . The trial court explained that it had a problem of other cases calendared for trial at the same time or about the same time and had difficulty in fitting them all in with the least inconvenience to all concerned. Finally, there is the important fact that from an examination of the transcript of the trial as a whole, it is apparent that counsel for the appellant (well known nationally to court and coun-

> sel as an able and effective lawyer) conducted himself with his usual considerable skill and energy. His actions showed that he had spent a considerable amount of time on the law of the case, for he had many comments and objections to make, both concerning the introduction of evidence and the instructions given to the jury. These he vigorously pursued before the trial judge. We are of the opinion that all things considered, it cannot fairly nor honestly be said that the appellant was denied effective assistance of counsel simply because the trial judge refused to grant *further* continuances. . . ."

Within this framework of test and application, it appears that the Court did not abuse its discretion in denying the continuance.

Initially, it should be recognized that the Court was quite obviously aware of the problem which is now before this appellate court. The transcript reveals that after listening to a renewed motion for a continuance the Court stated that a mere general claim that there was not enough time in which to prepare the defense was not enough; however, the Court did not preclude a specific showing as witnessed by its statement:

> "If you have something you want to do to prepare for your defense and you show me that it has any semblance of anything, I will be glad to listen to it." [R. T. 365].

Despite this suggestion, if you will prodding, by the Court there was no specific reason stated by appellant's counsel why a continuance should be granted and the

Court recognized this in its closing remarks to the jury when it stated in reference to the motion:

> "They weren't legal reasons but they may have been good personal reasons." [R. T. 467].

Additionally a review of the transcript indicates that the defendants were in custody and as such were entitled to an expeditious trial of their case [C. T. 10-13]. The Trial Court indicated that the condition of its calendar was such that the matter had to be heard as set in order that the rights of the parties would not suffer with the passage of time [R. T. 273].

On April 13, 1961, the Grand Jury returned the indictment in question and within four days the appellant had retained the services of attorney Harold Cutler, as he appeared at the appellant's arraignment on April 17, 1961 [C. T. 2, 8]. Since the trial of this case did not commence until May 2, 1961, the attorney for Mr. Joseph had at least three weeks in which to become conversant with the facts and law in the matter. Also, the attorney had a week's notice that the case would be tried on May 2, 1961 [C. T. 10].

As to the trial itself, there is no indication that an extraordinary amount of time was required for preparation. Neither the application of the laws involved nor the facts in evidence were terribly complicated. Essentially, as discussed previously, there were three supervised "buys" of narcotics within a comparatively short period of time. Other than agents, there were only three witnesses to the purchases, the two defendants and the special employee, and all were present at the trial. Five exhibits were introduced during the

course of the trial and they consisted of the narcotics and their containers. Certainly this case stands in contrast with the typical mail fraud or tax prosecution where an unusually long period of time is required for preparation in view of the lapse of time between transactions, the great number of witnesses and exhibits and the complexity of the law.

A review of the record is often critical in determining whether counsel has had sufficient time in which to prepare for trial. In this case we find a former prosecutor's past experience clearly reflecting itself in the manner in which the appellant's defense was conducted [R. T. 414]. His objections were not only frequent but also well conceived as witnessed by the number of times they were sustained or caused Government counsel to alter his questions or line of inquiry.[3] His familiarity with the facts and law was indicated by his cross-examination of the Government witnesses. Among other things he brought out that the heroin in question had been diluted; the Federal Bureau of Narcotics had conducted a cursory search of the special employee and his automobile prior to the purchases in question; narcotics are often concealed in the body cavities which were not searched; the special employee was not always under observation during the purchases and the special employee was using narcotics at the time of his purchases from the

[3]The observations, requests and objections by Mr. Cutler in behalf of the appellant are found in the Reporter's Transcript on the following pages: 28, 55, 56, 67, 68, 71, 75, 80, 83, 84, 138, 141[2], 148[3], 149, 151, 156, 163, 165, 173, 178, 198, 199, 204, 205, 207, 208, 212, 243, 244, 248, 249, 253, 261, 262, 273, 275, 277, 278, 279, 352 and 355.

appellant. Additionally, counsel was familiar enough with the facts to be discussing a plea with the representatives of the United States a short time prior to trial [R. T. 507].

With all of the above in mind, it must be said that the trial Court did not abuse its discretion as it brought itself well within the test as voiced in this Circuit and others throughout the country.

IV.

CONCLUSION.

On the facts in this record and the law applicable thereto, for the reasons stated herein, the judgment entered against appellant Morris Joseph is free from error and should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

WILLIAM D. KELLER.